Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MELROSE, INC., PETITIONER

v.

CITY OF PITTSBURGH; CITY OF PITTSBURGH ZONING BOARD OF ADJUSTMENT; CLIFFORD B. LEVINE, ESQ.; REGIS D. MURRIN, ESQ.; JESSE W. FIFE, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Writ for Certiorari addresses salient issues of law that must be addressed by this Honorable Court given the impact on public policy and administrative agencies. The means and methods of media, advertising and marketing have changed in society due to the ever-increasing use of internet, blogs, and groups. With this change of media, there has also been an influx of names of corporations that reflect the "on-line" registered name. Zoning boards must embrace the changes that have occurred and not ban the naming of a building because the name of the building is the name an internet company. There must be a cohesive balance which protects first amendment as well as an administrative agency's decision.

In a case where a Zoning Board of Adjustment (an administrative agency) makes an adjudicatory determination, that determination is not legislative in nature, and as such, attempting to apply the standard set forth in *Rappa v. New Castle City*, 18 F.3d 1043 (3d Cir. 1994) for "content-neutrality" necessarily fails. As a result of that application, the Opinion herein set forth contradicts established United States Supreme Court precedent in no less than five (5) incidences. In the process, the Third Circuit deviates from applicable law and establishes a rationale that is the opposite of the holding in *Riel v. Bradford*, 48 F.3d 736 (3rd Cir. 2007), but yet results in the same conclusion. The end result is that there is essentially no Constitutional protection for commercial advertising signs, the exact result which *Rappa* seeks to avoid at pages1069-1070 therein.

Therefore, the Petitioner presents to this Honorable Court three salient constitutional questions that impact the ever-changing corporate industry.

I. **Whether the intent of a speaker is permitted to be analyzed when determining whether a legislation as applied violates the First Amendment?**

II. **Whether the lower courts erred in failing to apply a strict scrutiny standard when a local zoning board abused its powers and restricted the freedom of speech of owners to name their property?**

III. **Whether Building I.D. signs with commercial content signs are due equal constitutional protection and the means in regulating the speech therein so that the First Amendment is not violated?**

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 613 F. 3d 380 (3rd Cir. July 20, 2010)(1a). The opinion of the United States District Court for the Western District of Pennsylvania is unreported at 2008 U.S. Dist. LEXIS 76198 (WD PA Sept. 30, 2008)(29a).

JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit, was handed down on July 20, 2010. A timely Petition for Rehearing was denied on August 13, 2010.(92a) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1)

RELEVANT PROVISIONS INVOLVED

U.S. Const. I Amend.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const XIV Amend.

> The Due Process Clause of the Fourteenth Amendment provides that no State "shall ... deprive any person of life, liberty, or property, without due process of law...."

STATEMENT

Melrose, Inc. the "Petitioner", is a Pennsylvania Corporation, which from approximately May of 1998 through February of 1999 acquired leases to the naming rights of certain buildings in Pittsburgh, Pennsylvania. The leases included buildings at: 840 East Ohio Street; 818 East Ohio Street; 1217 West Carson Street; 57 Bates Street; and 1025-33 Beaver Avenue.

Petitioner applied for and received permits for signs identifying the names on each of the aforementioned buildings.[1] The Zoning Administrator approved each application based upon the application for a Building Identification sign under and subject to the Zoning Code therein in effect. The applicable Section was Section 919 101(c)(4) which read as follows:

> 4. Identification Sign means a sign used to identify the name of the individual or organization occupying the premises; the profession of the occupant, **the name of the building on which the sign is displayed**; or the name of the major enterprise or principal product or service on the premises (emphasis added).

The original signs (names) were: "Ram Staiger" (840 East Ohio Street); "Caskey Limited" (818 East

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[1] The Magistrate incorrectly states in her 1 Footnote 4 of the R&R and this Court also noted in Footnote 3 of its Opinion, that no permit was received for the Beaver Avenue property. Melrose did receive the appropriate permit thereto, and referenced this Court to evidence of the same at Footnote 1 in its Brief.

Ohio Street); "Three Rivers Building" (1217 West Carson Street); "The Cole Building, originally The Owens Building" (57 Bates Street); "SSPP" (Beaver Avenue).

On March 21, 2001 Petitioner applied to change the names of the buildings and the front lettering of the corresponding signs with the Zoning Administrator. The applicable changes were from "Ram Staiger" to "Baruch Atah Hashem"; from "Caskey Ltd." to "PALEGALHELP.com"; from "The Cole Building" to "WEHIRENURSES.COM Building"; from "SSPP" to "PALEGALHELP.com"; the "Three Rivers Building" to change to "an unspecified name."

All five individual applications were the name of specific buildings. The Zoning Administrator denied all five applications. The reasons stated were the "sign content was advertising." These signs reflected the name of the buildings. They were identification signs and could not be pigeonholed as only commercial signs.

The Petitioner timely filed a Notice of Appeal to the Zoning Board of Adjustment ("ZBA").

The Courts repeated the claim that sign longevity was a concern stated and was a compelling reason for the City to deny the building name applications. However, During oral arguments before the 3rd circuit on 1-26-2009, City Lawyer Baumiller was asked " If Melrose owned the building and agreed to keep a name for 20 years would the City then grant approval? The city lawyer said " Melrose would still be denied" and added "other Building names with

commercial content could change their name in an instant!".

On December 7, 2001, the ZBA issued five (5) negative determinations. However, prior to issuing these determinations, the Zoning Board issued a determination in Heinz Field's application for a **variance** to its sign, and additionally, what is most noteworthy, is that all of these hearings, inclusive of Melrose's hearings, were heard **prior** to the "Heinz" written determination.

Melrose, by and through counsel, filed the instant action in the District Court for the United States District of Western Pennsylvania, claiming, inter alia, that such actions interfered with its rights to speech and equal protection. The District Court magistrate, basing her decision on *Central Hudson Gas & Electric Corp. v. Public Commission of New York*, 447 U.S. 557 (1980), issued summary judgment in favor of the City of Pittsburgh. Subsequently thereto, the District Court judge, the Honorable Conti, J likewise found in favor of the City of Pittsburgh based on a Central Hudson analysis with a differing rationale.

Melrose timely appealed that decision to Third Circuit. On July 20, 2010, that Court, by the Honorable Fuentes, J issued a Decision and Opinion upholding summary judgment for the City of Pittsburgh.

REASONS FOR GRANTING THE PETITION

This Writ encompasses such important public policy and constitutional issues that must be reviewed by this Honorable Court, including the regulation of

signs as compared to a person's constitutional rights under the First Amendment.

I. Whether the intent of a speaker is permitted to be analyzed when determining whether a legislation as applied violates the First Amendment?

The Petitioner alleges that the Third Circuit deviated from applicable law and since the strict scrutiny standard should have been applied, since the First and Fourteenth Amendments of the Constitution are recognized as fundamental.

Commercial speech is an expression related solely to the economic interests of the speaker and of its audience, " *Central Hudson Gas & Electric v. Public Service Comm'n of New York*, 447 U.S. 557 (1980). When the government sets rules to control the content by individual analysis not through previous legislation but determination on how an administrator may feel toward a speaker or corporation, a court must apply the strict scrutiny test. *Citizens United v. Federal Election Commissio*n, 130 S.Ct. 876 (2010), (Citizens United was a landmark decision by the United States Supreme Court holding that corporate funding of independent political broadcasts in candidate elections cannot be limited under the First Amendment).

The dicta in *Citizens United* and *Central Hudso*n provide a sufficient framework for protecting the interests of the Petitioner in the present case. Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints or to distinguish among different

speakers, which may be a means to control content. The government (also via the local public officials and boards) may also commit a constitutional wrong when by law it identifies certain preferred speakers. There is no basis for the proposition that, in the political speech context, the government entity may impose restrictions on certain disfavored speakers. Both history and logic lead to this conclusion.

In our facts, the local zoning board has limited the Petitioner's speech in an arbitrary manner thereby violating their constitutional rights and equal protection. The United States Supreme Court has continuously ruled that any speech limitations must be clear, not arbitrary and have equal protections granted. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (internal quotation marks and citation omitted). The Supreme Court has held that "[a] government regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." *Id*, at 130.

In our facts, the speech, a building identification name, was arbitrarily denied. The lower courts and the local authority deviated from applicable law and failed to recognize that a building identification name or business identification name all may have an advertising component would be an exception to a general ban on advertising signs. A simple contextual analysis is capable of being determinative of a name as applied for, adorns or otherwise "names" a building or a business is located in the building. A name of a building or of a business can be verified with a strict and clear

limit of contextual evaluation. This is true even for a facially neutral provision. *Riel, supra* at 55. Accordingly, to avoid the danger of censorship, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority." *Forsyth County, supra*, at 131.

A comparison of the local officials' arbitrary decision, the zoning code has allowed McDonalds to have three signs on a building: the name of the building, the name of the restaurant, and the third an advertising sign that also shows the special items on the menu. However, local officials have denied the Petitioner from placing a sign on their buildings to identify the name of the building. The zoning code said the signs had to be the of the name the building, however, the ZBA, in an arbitrary decision, established sudden new criteria after the Petitioner's signs were approved, built, previous name changes permitted, and a subsequent name change application, rejected.. This criterion the lower court states essentially lends itself to the permanency of the same, i.e., longevity of the naming rights contract, whether or not the applicant is the owner of the building, and whether or not the place to be named is a substantial destination place, etc. At the outset it should be noted that if the ZBA has any "rule making" authority, it was not sitting or acting in that capacity, but to the contrary it was sitting as an adjudicatory board. Essentially, the Third Circuit defined the "criterion" as part and parcel of the exception crafted by the ordinance; however, this simply is not the fact. The criterion is an "exception" to the "exception" created by the ordinance (i.e., an exception allowing for building ID names). In

Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), this Court applied the commercial speech test of *Central Hudson*[2] and *Fox*[3], and struck down an ordinance that banned news racks with commercial handbills. The Court held that Cincinnati "had enacted

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[2] *Central Hudson G& E v. PSC of New York*, 447 U.S. 557 (1980) . The Public Service Commission of New York (PSC), in the interest of conserving energy, enacted a regulation that prohibited electric utilities from promoting electricity use. The PSC's regulation distinguished promotional advertising from informational advertising, which was permitted. Central Hudson Gas and Electric challenged the regulation in a New York State Supreme Court, which upheld the regulation. The Appellate Division of the New York State Supreme Court affirmed the decision, as did the New York Court of Appeals. The SupremeCourt overruled the Court of Appeals of New York and held that the New York's ban violated the right to commercial speech. Writing for the majority, Justice Lewis F. Powell cited the protections for "commercial speech from unwarranted governmental regulation". The Court recognized New York's interest in promoting energy conservation and accepted that the PSC's regulation would directly further that interest. However, since the regulation restricted all promotional advertising regardless of its effect on electricity use, it violated the First and Fourteenth Amendment. The "Central Hudson Test": When regulating truthful advertising about lawful products or services: a) The government must assert a substantial state interest to justify the regulation; b) The government must demonstrate that the regulation of advertising directly advances the state interest; c) The regulation must be narrowly drawn, no more extensive than is necessary to serve the interest asserted by the state.

[3] *Bd of Trustees of Suny v. Fox*, 190 S.Ct. 3028 (1989) ("Central Hudson require(s) only a reasonable 'fit' between the government's ends and the means chosen to accomplish those ends....So long as the means are narrowly tailored to achieve the desired objective, it is for governmental decisionmakers to judge what manner of regulation may be employed.")

a sweeping ban on the use of new racks that distributed 'commercial hand bills,' but not 'newspapers.' Under the City's news rack policy, whether any particular news-rack falls within the ban is determined by the content of the publication resting inside the news rack. Thus by any common sense understanding of the term, the ban in the case is 'content based'."

The restrictions against the Petitioner becomes clear when the Third Circuit in its Opinion had to define the public goal as "prevented a proliferation of advertising signs with rapidly changing content that purport to be identification signs". A law narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the relation." *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). In this case the parties agree that the speech is not misleading. This requirement voids the multi- prong central Hudson test.

Clearly the *Rappa* and *Riel* test was not created to analyze what is essentially at best a case by case analysis. It is herein argued that by definition an analysis which needs to be done on a case by case basis is non-content-neutral. This seduces litigation of every arbitrarily rejected application The Supreme Court addresses additional burdens regarding speech "when the FEC issues advisory opinions that prohibit speech,"[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves, but society as a whole, which is deprived of an uninhibited marketplace of ideas".

Virginia v. Hicks, 539 U.S. 113,119 (2003) (citation omitted).

Furthermore, the assistant zoning administrator stated "Heinz and PNC can do this but you can't because they have millions of dollars". Through cross examinations at the June 21, 2001 ZBA hearing the Administrator claimed "he could not recall if he said that." Of course, First Amendment protections do not depend on the speaker's "financial ability to engage in public discussion."

Therefore, the ZBA's decision was arbitrary. The Petitioner was due equal protection under the laws. However, the lower courts erroneously deviated from applicable law and put restrictions on the identification of the Petitioner's buildings that did not promote substantial government interest.

II. Whether the lower courts erred in failing to apply a strict scrutiny standard when a local zoning board abused its powers and restricted the freedom of speech of owners to name their property?

The Petitioner hereby states that the lower courts deviated from applicable law in failing to apply a strict scrutiny standard when local authorities abused its power and restricted owners of their constitutional rights of freedom of speech in naming a building. Restriction of speech must have strict scrutiny. Throughout the ruling the courts ask or claim to concern themselves about the Melrose strategy. Speech itself is a protected class, *Citizens United*,

supra. Although the First Amendment provides that "Congress shall make no law ... abridging the freedom of speech," §441b's prohibition on corporate independent expenditures is an outright ban on speech, backed by criminal sanctions. It is a ban notwithstanding the fact that a PAC created by a corporation can still speak, for a PAC is a separate association from the corporation.

Because speech is an essential mechanism of democracy—it is the means to hold officials accountable to the people—political speech must prevail against laws that would suppress it by design or inadvertence. Laws burdening such speech are subject to strict scrutiny, which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* That would mean the Government must have a substantial interest not just an interest.

The Third Circuit determined that under the ordinance in question, the ordinance which provides for building identification signs, was an exception to the burden[4] provided by the City ordinance on advertising signs. While it is not clear that this is a facially proper interpretation of these ordinances, this would effectively lend itself to be a "true" *Rappa* and *Riel* analysis.

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[4] While the lower court states that no advertising signs were permitted in these districts, that is not necessarily clear. However, for purposes herein constituted, these signs would not be available to Petitioner as advertising signs within those areas, and therefore we think that this is a distinction without meaning in the instant case analysis.

Simply stated, a building identification name which also has an advertising component would be an exception to a general ban on advertising signs. A simple contextual analysis is capable of being determinative of a name as applied for, adorns or otherwise "names" a building.

However, in our facts, the ZBA, felt necessary to set out certain criteria (probably with the intent thereto, merely to exclude the Petitioner's signs). This criterion the lower court states essentially lends itself to the permanency of the same, i.e., longevity of the naming rights contract, whether or not the applicant is the owner of the building, and whether or not the place to be named is a substantial destination place, etc.

At the outset it should be noted that if the ZBA has any "rule making" authority, it was not sitting or acting in that capacity, but to the contrary it was sitting as an adjudicatory board. Essentially, the Third Circuit defined the "criterion" as part and parcel of the exception crafted by the ordinance, however, this simply is not the fact. The criterion is an "exception" to the "exception" created by the ordinance (i.e., an exception allowing for building identification names).

Moreover, the nuance becomes clear when the Third Circuit in its Opinion defined the public goal as "prevented a proliferation of advertising signs with rapidly changing content that purport to be identification signs". (Opinion at 18).

Clearly the *Rappa* and *Riel* test was not created to analyze what is essentially at best a case by case analysis. It is herein argued that by definition an

analysis which needs to be done on a case by case basis is non-content-neutral.

Also, the Third Circuit's Opinion, more than four (4) occasions, referenced "genuine" identification signs and the Petitioner's "intent." This Honorable Court has already determined that intent cannot be considered as a factor relating to the protection of speech, and if it necessarily is determinative, then by definition that inquiry is non-content-neutral. *FEC v. Wisconsin Right to Life*, 127 S.Ct. 2652 (2008).

Furthermore, the Supreme Court has clearly held that when the application of the state interest is such to apply solely to one individual or very few of a group, the application thereto must be constitutionally infirm. This premise was clearly delineated by the Supreme Court in *U.S. v. Playboy Entertainment Group, Inc.* 529 U.S. 803; 120 S.Ct. 1878 (2000). As the Court clearly states therein

> Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles. Section 505 limited Playboy's market as a penalty for its programming choice, though other channels capable of transmitting like material are altogether exempt.

529 U.S. 803 at 812.

The Petitioner appears to be the only speaker which is denied under the existing state interest and criterion as previously described by the Third Circuit's interpretation of the Zoning Board of Adjustment's

determinations. It must be emphasized that the Zoning Administrator had previously approved naming rights and signs for all these locations. It was clearly the change to the **new** names which triggered the mandated review by the Zoning Board of Adjustment. Additionally, it was not the fact of the change itself, because the Zoning Administrator had already previously approved the change of names on the Bates Street property from Owens to Cole without reference to the Zoning Board of Adjustment. On this point, this Opinion is completely contradictory to the Third Circuit's own opinion in *Riel*. In *Riel* at page 753 it stated:

> As the City has explained, "the vast majority of signs within the historic district are commercial signs, and such signs tend to be **erected for longer periods of time** and tend to be larger and more elaborate in design." (emphasis added)

Thus in *Riel*, the Third Circuit held that the distinction allowing for the discrimination between non-commercial and commercial signs lie in the fact that commercial signs have more longevity. In our case, the Zoning Administrator allowed non-commercial names and concomitant signs, but balked at commercial names and concomitant signs.

For the antithetical reason of *Riel*, the Third Circuit came to the same conclusion. That is, the Zoning Board is allowed to discriminate against commercial signs in this case because they are not of a tendency to be long in duration. It is quite apparent that these two opposite precepts cannot justify the identical conclusion. Clearly, these two decisions are entirely in

conflict with one another as to the non-neutrality of distinguishing between commercial and non-commercial signs.

The Third Circuit states in *Riel* that commercial advertising signs have enjoyed the least amount of First Amendment protection. *Riel* at 753. However, these are not advertising signs, but they are building identification names, which also advertise, but of greater concern herein is that the effect of using the opinion in *Riel*, now coupled with the Opinion in this case, there remains no effective protection to commercial advertising signs, and thus has come full circle and rejected a precept which was clearly antithetical to *Rappa* at 1069-1070.

As an aside, the comparison here to Heinz is inapplicable, as the testimony and the documentation was that Heinz was going to have the name and signs regardless of the outcome of the hearing. The testimony and facts indicated that Heinz was applying for a variance for signs which were exceptional even under the building identification exception. The above illustrates that the submittal of these signs to the Zoning Board of Adjustment and concomitant negative determination by the same was content laden. The Third Circuit Court Opinion ultimately hangs the viewpoint or content analysis on the simple fact that there is a protection inherent in a Board making a determination as opposed to one individual (see Opinion at p. 20-21):

> Finally, the Zoning Board, which applies these criteria in reviewing the Zoning Administrator's decisions, is comprised of three members, which

> protects against the "whim or caprice of one single official" citing *Riel*, 485 F.3d at 756.

If a plurality was simply necessary to protect against viewpoint discrimination, in fact no Congressional or legislative statute could conceivably ever abridge the rights to speech. The City of Pittsburgh's code could have simply stated all naming signs must have substantial size limits. Rather, the City would rather determine on an individual basis, an arbitrary and indefinable amount of advertising or who the speaker or who is the business. The City of Pittsburgh lawyer stated during oral arguments at the Third Circuit, "PNC is a better name than Pirate Park because Pirate Park would be depressing". This is indicative of the illegal content based decisions of the City of Pittsburgh. "This is true even for a facially neutral provision. *Riel*, 485 F.3d at 755. Accordingly, to avoid the danger of censorship, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority." *Forsyth County, Ga.*, 505 U.S. at 131

The inherent problem in using the *Rappa* analysis as it applies to Petitioner's case is that it is an exception to an exception. When applying an exception to an exception and attempting to use the standard of "allowing an exception which impinges as little as possible on the overall goal" when said overall goal is as least as important as the original exception, becomes that of one where the goal of the second exception is the same as the original goal and consequently by definition not as important as the exception thereto.

Moreover, this entire analysis is contrary to maximizing the promotion of the constitutional right, i.e. speech, and minimizing or imposing the least restrictive method to obtain the state interest. It is black letter law that in juxtaposing a Constitutional right with the state interest, the erring should always be on imposing the greatest latitude to the Constitutional right (see, e.g., *Citizens United, supra*; *FEC v. Wisconsin Right to Life*, 127 S.Ct. 2652 (2008); *Central Hudson Gas & Electric Corp. v. Public Commission of New York*, 447 U.S. 557 (1980); *New York Times v. Sullivan*, 376 U.S. 254 (1964)).

There are two other miscues of the lower court opinions, which are of more colloquial concern to the Petitioner, and not, perhaps, as important to this Court's concerns about uniformity of law and precedential considerations. The first concern of which is the Third Circuit's description of the ZBA's "criterion" to begin with. Nothing is discussed in the Third Circuit Court's Opinion regarding the language of the ZBA determinations wherein it specifically states: "that they are drawing no fine lines," and in fact they outright state that the analysis depends on: "the degree of advertising." This language is much more indicative of the subjective, non-content neutral application of these decisions being made. This is further buttressed by the City's counsel's argument at oral argument wherein he stated that even if Melrose had longer, more secure commitments relating to the control and duration aspects of these names, the signs would **not** have been approved anyway.

The second more colloquial problem with the Third Circuit Court's Opinion is located in Footnote 9

therein, where this Court states that the Petitioner argues at least, the City is not entitled to summary judgment because there are facts to be determined. The Third Circuit Court then states that the Petitioner indicated no such facts. Quite the contrary, the Petitioner argues in its brief that there are several ultimate facts which they are entitled to prove at trial. For example, the Petitioner argued that whether the Board did in reality make its decision because it did not like or approve of the specific names of these buildings, i.e., viewpoint discrimination, is a factual question entitled to be tried. The Third Circuit Court's Opinion of this Court simply states that the Petitioner did not prove the same. "There is no indication that the City sought to 'censor certain viewpoints' when it articulated and applied these criteria." (Opinion at 15). Thus, whether the Board members made a decision in fact that they did not like or approve of these names is an ultimate question which the Petitioner is entitled to prove at trial. Fed.R.Civ.P. 56.

Therefore, the Third Circuit Court erred in its reliance on *Rappa* and *Riel*, and as treating an adjudicative decision the same as a legislative pronouncement. Secondly, even if it were proper, the adjudicative aspect in reality creates an exception to an exception which is outside the scope of *Rappa* and *Riel*. The lower courts erred in failing to apply a strict scrutiny standard when a local zoning board abused its powers and restricted the freedom of speech of owners to name their property. This Writ must be granted so that these salient issues be addressed by this Honorable Court.

III. Whether Building I.D. signs with commercial content are due equal constitutional protection and the means in regulating the speech therein so that the First Amendment is not violated?

The Petitioner hereby alleges that they are owed equal protection to the application of the Zoning Code with respect to sign applications. The Petitioner did not get equal protection since they were denied the opportunity to have commercial names on the building identification signs. The signs identified the occupants and the products therein.

On the other hand, the City of Pittsburgh would argue that they would allow some and disallow other commercial names of a building. . Of course, such an argument has been held unconstitutional by this Honorable Supreme Court due to equal protection jurisprudence. See *Loving v. Virginia,* 388 U.S. 1 (1967), *Griswold v. Connecticut,* 381 U.S. 479 (1965)), *Shapiro v. Thompson,* 394 U.S. 618 (1969). For any abridgment of those rights to be constitutional, the Court has held, the legislation must pass strict scrutiny. *Id.*

The Petitioner also raises an equal protection challenge to the application of the Zoning Code to its sign applications. It contends that the Zoning Board treated its applications differently than those for new signage, for example, those at PNC Park, Mellon Arena, and I.C. Light Amphitheater. It appears that the arbitrary decisions to allow large, corporate,

commercial entities on buildings in the City of Pittsburgh without any restrictions, but at the same time, the Petitioner is subject to arbitrary, capricious and irrational discrimination. Such an unfair process must be strictly scrutinized.

If a statute is content-based, then the State is required "to show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.' " *Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 1164, 99 L.Ed.2d 333 (1988). On the other hand, if the statute is content-neutral, and merely restricts the total quantity of speech by regulating the time, the place or the manner in which one can speak, a very different test applies. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804-05, 104 S.Ct. 2118, 2128-29, 80 L.Ed.2d 772 (1984).

In our case the City does permit names of building signs, if that is the building name. The City over steps all laws by trying to ban certain types of commercial names while allowing others. Then after rejecting non favorite signs, then subsequently writing a law that allows some and not others. The Supreme Court ruling allows a municipality to ban or allow all off a type, not to determine by content or speaker. *Metro Media Inc. v. City of San Diego*, 453 U.S 490, 507-510 (1981).

It is clear that Petitioner's rights have been violated. Speech and sign regulations must have strict scrutiny if content based. When the Fourteenth Amendment is controlled by individuals suspect classes

can be created. Strict scrutiny is the control that prevents prejudices to develop by content control of free speech and removes doubt of equal treatment. The Circuit Courts are also divided as the proper governing standard as cited in the cases above.

Rappa, Reil, Cental Hudson and other regional free speech laws, leave questions of a national standard, including that of strict scrutiny. To pass strict scrutiny, the law or policy must satisfy three prongs. First, it must be justified by a compelling governmental interest. While the Courts have never brightly defined how to determine if an interest is compelling, the concept generally refers to something necessary or crucial, as opposed to something merely preferred. Second, the law or policy must be narrowly tailored to achieve that goal or interest. If the government action is overbroad or fails to address essential aspects of the compelling interest, then the rule is not considered narrowly tailored. Finally, the law or policy must be the least restrictive means for achieving that interest. The Supreme Court has explained that "the requirement of narrow tailoring is satisfied 'so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 2906, 86 L.Ed.2d 536 (1985).

The current case has such a major impact on corporate identity and commercial identities. Since there is a lack of clear laws, this case is ripe for adjudication to this Honorable Court.

The Third Circuit never considered how the City of Pittsburgh could have accomplished its goals by less

restrictive means. By banning some types of identification signs in the regulatory scheme and not others, the ZBA had empowered itself with arbitrary and capricious decision making power. The underlying purposes of equal protection has been defeated since the Court has narrowly tailored what signs are acceptable. The City failed to address its concerns about the Petitioner's signs. Obviously, they were not concerned with size, shape, or appearance. However, the City was concerned with the "speech" of the identification business signs.

Furthermore, masquerading as "criteria" is simply a case by case determination, which is the function of an adjudicative board. However, unless requiring a variance, which was not the situation for the Petitioner, the simple analysis asks, is this the name of a building. At these hearings, each of the owners were asked the same and testified in the affirmative and that the Petitioner had the right to name the same.

The Petitioner was entitled to equal protection. Any subsequent analysis or concern becomes indicative of the non-content neutral, subjective nature of application of the ordinance. This Writ must be accepted by this Honorable Court so that a criteria is established for the Courts regarding the standardization of signage and building names which meets First Amendment, equal protection and due process requirements.

CONCLUSION

For the reasons stated above, the petition should be granted.

Respectfully submitted,

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No. 08-4425

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MELROSE, INC.,
Appellant
v.
CITY OF PITTSBURGH; CITY OF PITTSBURGH ZONING BOARD OF ADJUSTMENT; CLIFFORD B. LEVINE, ESQ.; REGIS D. MURRIN, ESQ.; JESSE W. FIFE, JR.,

January 25, 2010, Argued
July 20, 2010, Opinion Filed

On Appeal from the District Court for the Western District of Pennsylvania. (No. 02-cv-01161). District Judge: Joy Flowers Conti.

COUNSEL: Howard R. Lehman, Esq. (Argued), Pittsburgh, PA, Counsel for Appellant.

Lawrence H. Baumiller, Esq. (Argued), George R. Specter, Esq., Pittsburgh, PA, Counsel for Appellees.

JUDGES: Before: FUENTES and FISHER, Circuit Judges, and DIAMOND, * District Judge.

OPINION OF THE COURT

FUENTES, Circuit Judge:

Melrose, Inc. ("Melrose") brought this action challenging the Pittsburgh Zoning Board's rejection of

its applications to change the Identification Signs on five Pittsburgh buildings. The proposed building names included "wehirenurses.com building" and "palegalhelp.com." The Zoning Board determined that the signs were Advertising Signs and were therefore prohibited in the zoning districts where Melrose's buildings were located. In reaching this decision, the Zoning Board applied four criteria that it had articulated in a prior decision for determining whether a sign with advertising aspects could still be classified as a genuine Identification Sign. Melrose challenged this decision in the District Court, arguing that the Zoning Board's rejection of its sign applications violated its First Amendment free speech and Fourteenth Amendment equal protection rights. The District Court rejected Melrose's claims, applying *Central Hudson Gas & Electric Corp. v. Public Commission of New York*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980), which provides the standard for assessing restrictions on commercial speech.

In our view, Melrose's First Amendment claim is not controlled by Central Hudson, but instead should be evaluated under the test we delineated in *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994). Applying *Rappa*, we hold that the Zoning Board's application of the criteria constituted a permissible "context-sensitive" analysis. We also conclude that Melrose's equal protection claims must fail as Melrose is simply not similarly situated to the entities that it claims were treated differently. Accordingly, we affirm the District Court's grant of summary judgment.

I.

Between May 1998 and February 1999, Melrose, a Pennsylvania corporation, executed lease agreements with the owners of five Pittsburgh buildings. Each lease granted Melrose the right to name the building and to construct and display signs on the building with that name, as well as the right to sublease or assign these naming rights. The leases, which varied in length from six to twenty-seven years, did not limit the number of times that Melrose could change a building's name.[1]

Starting in February 1999, Melrose filed applications with the city's zoning administrator to erect building identification signs on the five properties. The process went smoothly and the requested names were approved. The building at 840 East Ohio Street was named "Ram Staiger," a combination of the building owner's name and a business on the premises.[2] The nearby building at 818 East Ohio Street was named "Caskey Limited," after the girlfriend of one of Melrose's officers. A building at 1217 West Carson Street was named the "Three Rivers Building," and one at 57 Bates Street was named "The Cole Building," after the son of a Melrose officer. The fifth building, at 1025-33 Beaver Avenue, was named "SSSP."[3]

In March 2001, Melrose submitted applications to rename each of the five buildings and change their signage. The Cole Building was to be renamed the "wehirenurses.com building." The application included a drawing of one proposed sign, twenty-five feet wide and twenty feet high, with "wehirenurses.com" repeated on four separate lines and the word "building" below that on a fifth line. The SSSP and Caskey Limited buildings were both to be renamed

"palegalhelp.com." The Ram Staiger building's name was to be changed to "Baruch Atah Hashem," a Hebrew expression that means "Blessed be God." A signage application was also submitted for the Three Rivers Building, but it did not specify the new name. At a hearing before the Zoning Board, however, the president of Melrose testified that he intended to change the name of this building to "www.palegalhelp.com." Melrose did not propose any changes to the location, size, or shape of the signs already in place on the buildings, but instead sought to change only the signs' content.

The Pittsburgh Zoning Code ("Zoning Code") distinguishes between three categories of signs. These definitions are important as Melrose sought to have its signs, with the proposed new names, remain classified as "Identification Signs." "Identification Signs" are permitted in certain zones that prohibit "Advertising Signs." Pittsburgh Code of Ordinances § 919.02. Section 919.01.C of the Zoning Code, in effect at the time of Melrose's applications, provided these definitions:

> 2. Advertising Sign means a sign that directs attention to a business, commodity, service or entertainment, conducted, sold or offered:
>
> (a) Only elsewhere than upon the premises where the sign is displayed; or
>
> (b) As a minor and incidental activity upon the premises where the sign is displayed.
>
> 3. Business Sign means a sign that directs attention to a business, organization, profession

> or industry located upon the premises where the sign is displayed; to the type of products sold, manufactured or assembled; and/or to the service or entertainment offered on such premises; except a sign pertaining to the preceding if such activity is only minor and incidental to the principal use of the premises.
>
> 4. Identification Sign means a sign used to identify the name of the individual or organization occupying the premises; the profession of the occupant; the name of the building on which the sign is displayed; or the name of the major enterprise or principal product or service on the premises.

(J.A. at 120.) In addition to only being permitted in certain zoning districts, "Advertising Signs" are subject, under § 919.02, to more rigorous regulations, with respect to location, placement, size, shape, and illumination, than non-advertising signs. These restrictions further the purposes of the Code's sign regulations, which include allowing advertising signs only in locations that "neither lessen the visual attributes of the City through the placement of such signs, nor cause confusion, safety problems or lessen the ability to identify local businesses through visual clutter." Pittsburgh Code of Ordinances § 919.01.A.11.

Finding that the proposed signs' content represented advertising, the Zoning Administrator denied all of Melrose's applications. The five buildings were in zoning districts where the Zoning Code generally prohibited Advertising Signs, but allowed Business Signs and Identification Signs. Melrose appealed these

decisions to the Zoning Board, which conducted consolidated hearings. It denied all five appeals in separate decisions.

The Zoning Board found that the proposed signs for the buildings to be named "palegalhelp.com" and "wehirenurses.com building" represented "a plan or strategy of evasion," which sought to avoid the Zoning Code's restrictions on Advertising Signs. (J.A. at 70.) As for the building to be named "Baruch Atah Ashem," which Melrose described as a "religious message," the Zoning Board found that this name did not fit within the Zoning Code's definition for an Identification Sign. (*Id.* at 62.) The City of Pittsburgh had sent the Zoning Board a letter advising that there was no legal basis for denying this application on the grounds that it had no advertising component and was a valid building name. Without addressing the City's position, the Zoning Board denied the application but invited Melrose to brief the possible constitutional implications of this particular decision. Melrose did not, however, pursue the matter further at the Zoning Board level. As for the fifth building, which Melrose did not provide a new name for in its application, the Zoning Board found that the Zoning Administrator should not have made a decision until the application was completed. It remanded to the Zoning Administrator so that Melrose could submit an amended application, but a new application was never submitted.

One month before its decisions on Melrose's appeals, the Zoning Board had approved signs for Heinz Field, a major football stadium that is home to the National Football League's Pittsburgh Steelers and the University of Pittsburgh's football team. The H.J.

Heinz Company ("Heinz") had entered into a sponsorship agreement with the Steelers and had spent $ 57 million to obtain the naming rights to the Stadium for a period of twenty years. Neighborhood organizations challenged the proposed signage at Heinz Field, arguing that the signs were Advertising Signs rather than Identification Signs and therefore prohibited. In an interim decision in the case, issued on August 15, 2001, the Zoning Board acknowledged that certain Identification Signs, which mention the name of a company or product, may also have an advertising aspect. Accordingly, it identified four attributes that an Identification Sign with an advertising component must possess to avoid being categorized as an Advertising Sign. The four criteria included: first, one of the sign's major purposes is to establish a destination point generally recognized by the public at a specific location; second, the established location is important to a material segment of the public (for example, a sports, cultural, commercial or artistic venue); third, "there must be evidence of intended longevity of the sign adequate to sustain the designation point concept"; and fourth, either the owner of the facility or its principal user should be in control of the destiny of the sign, rather than a third party. (Pl.'s Mot. for. Summ. J. App. at 295-96 [Pittsburgh Zoning Board of Adjustment, Interim Decision in Zone Case 85 of 2001 (Aug. 15, 2001)].) These criteria were subsequently cited in the decisions rejecting Melrose's applications, although in a slightly different formulation. In its decision applying these criteria and approving the Heinz Field signage, the Board recognized the advertising component of naming rights but emphasized that the Steelers' lengthy lease agreement for the stadium and the lengthy sponsorship agreement reached with Heinz

reflected a "long-term commitment that the Stadium will be known to the general public as 'Heinz Field.'" (Supp. App. at 10.) It concluded that the naming was not a "subterfuge to circumvent the Code's limitations on advertising" but instead a legitimate attempt to name the stadium, albeit with a natural consequence of advertising and marketing benefits for Heinz. (*Id.*)

In its subsequent decisions rejecting Melrose's applications, the Zoning Board offered a slightly different articulation of the attributes that it would consider necessary for "a purported 'Identification Sign' . . . to avoid being categorized as an Advertising Sign." (J.A. at 56.) These included that:

> One of its major purposes of, or result of, an identification sign must be to establish a specific destination point that will be generally recognized by the public as being at a set geographical location. There must be evidence of intended longevity of the sign adequate to sustain the designated point concept. It cannot be as transitory as a commercial billboard. However, it need not be immune from unexpected, unforeseen or unwelcome circumstances that might result in a termination. Either the owner of the facility or a principal long term space user thereof should be in control of the destiny of any such sign, rather than having control turned over to some third party, to assure continuing compliance with the necessary attributes.

Id.

In applying these criteria to Melrose's applications, the Board expressed particular concern with the longevity requirement and with the transfer of building identification rights, which it noted may lead to frequent changes for commercial purposes. Frequent changes in the content of signs and a lack of longevity were deemed inconsistent with the purposes of building Identification Signs -- directing the public towards a specific geographical location. The Zoning Board distinguished Melrose's failure to provide evidence of an intention to keep the building names for a substantial period of time from the twenty-year agreement entered into by the Steelers and Heinz. It also noted in its decisions that Melrose's representative had testified that the purpose of the signs was to direct individuals to the website business in order to make a profit.

Melrose filed this action in the Western District of Pennsylvania, alleging that Defendants -- the City of Pittsburgh, the Pittsburgh Zoning Board, and the three individual members of the Zoning Board -- violated its First and Fourteenth Amendment rights by arbitrarily denying its sign applications. Melrose asserted two claims pursuant to Section 1983: first, that Defendants deprived it of its First Amendment free speech rights when they impermissibly limited the content of its signs; and second, that Defendants deprived it of its Fourteenth Amendment equal protection rights by treating similarly situated entities more favorably. Melrose also brought a third claim pursuant to the equal protection clause of the Pennsylvania Constitution.

The case was referred to a Magistrate Judge for

pretrial proceedings. The Magistrate Judge issued a Report and Recommendation regarding Defendants' motion for summary judgment and Melrose's motion for partial summary judgment, recommending that the District Court grant Defendants' summary judgment motion and deny Melrose's motion. The Magistrate Judge evaluated Melrose's First Amendment claims in light of *Central Hudson Gas & Electric Corp. v. Public Commission of New York*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980), which sets forth a framework for assessing restrictions on commercial speech.

Under this four-part analysis, the court

> must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566. The Magistrate Judge found the proposed speech to be misleading, but nonetheless proceeded to examine the remaining factors. The Magistrate Judge concluded that the city had a substantial interest in restricting the placement of advertising signs, that the denial of Melrose's signs substantially advanced this interest, and that the regulation was not overly restrictive. The Magistrate Judge also rejected Melrose's equal protection claims,

finding that since the regulations passed muster under *Central Hudson's* commercial speech test, they necessarily survived equal protection analysis.

Melrose filed objections and the District Court conducted a de novo review of the record. The District Court adopted the Report and Recommendation in part and rejected it in part, ultimately granting Defendants' motion for summary judgment. The Court, applying *Central Hudson*, rejected the Magistrate Judge's finding that the proposed building names were misleading. Nonetheless, it ultimately adopted the Report and Recommendation's conclusion that the regulations constituted valid restrictions on commercial speech and did not violate Melrose's First Amendment rights. The Court held that the application related to the building Melrose intended to name "Baruch Atah Hashem" was not properly before it because Melrose had failed to reapply and brief the possible constitutional claim related to that application. Melrose does not raise this issue on appeal. The District Court rejected Melrose's argument that the term "Building Identification Sign" is unconstitutionally vague, either on its face or as applied. Finally, the Court rejected three additional objections to the Report and Recommendation and found that, even if summary judgment was not appropriate, the individual Defendants were entitled to immunity. Melrose filed a timely notice of appeal.

II.

The District Court exercised jurisdiction over Melrose's claims under 28 U.S.C. § 1331. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. We exercise

plenary review over a district court's summary judgment ruling. *Bus. Edge Group, Inc. v. Champion Mortgage Co., Inc.*, 519 F.3d 150, 153 n.5 (3d Cir. 2008). We apply the same standard as the District Court: "Summary judgment is appropriate only where, drawing all reasonable inferences in favor of the nonmoving party, there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *Ruehl v. Viacom, Inc.*, 500 F.3d 375, 380 n.6 (3d Cir. 2007) (internal quotation marks and citation omitted). In a case such as this, which involves First Amendment issues, an appellate court must "make an independent examination of the whole record." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984) (internal quotation marks and citation omitted).

III.

As Melrose clarified at oral argument, its challenge focuses on the Zoning Board's method of applying the sign ordinances and determining whether a purported Identification Sign, which has an advertising aspect, can still properly be classified as an Identification Sign. The District Court's decision analysed Melrose's claims by applying the framework articulated in *Central Hudson*. While we agree with the District Court's conclusion -- that the Zoning Board's decisions rejecting Melrose's sign applications did not violate Melrose's First and Fourteenth Amendment rights -- we hold that the proper framework for evaluating these claims is governed by our decision in *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994).[4]

A. Melrose's First Amendment Claim

In *Rappa*, we articulated a framework for determining whether a statute is content-based or content-neutral. This determination is the first step in a First Amendment analysis, as the answer dictates the standard that we apply in reviewing the ordinance at issue. *Rappa*, 18 F.3d at 1053 (quoting *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 99, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972)); *see also Riel v. City of Bradford*, 485 F.3d 736, 743 (3d Cir. 2007). If the statute is content-based, the government must "show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Rappa*, 18 F.3d at 1053 (quoting *Boos v. Barry*, 485 U.S. 312, 321, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988)) (internal quotation marks omitted). If instead the statute is found to be content-neutral in that it "merely restricts the total quantity of speech by regulating the time, the place or the manner in which one can speak, a very different test applies." *Id.* (citations omitted). Under this test, the government is permitted to "impose reasonable restrictions on the time, place, or manner of protected speech, provided [1] the restrictions 'are justified without reference to the content of the regulated speech, [2] that they are narrowly tailored to serve a significant governmental interest, and [3] that they leave open ample alternative channels for communication of the information.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984)) (further citation omitted).

Melrose contends that the Zoning Code was applied to its applications in a content-based manner and that no showing was made of a compelling state interest. In

response, the City argues that the sign ordinance was applied in a permissible content-neutral manner. In *Riel*, a case also involving First Amendment challenges to municipal sign ordinances, we observed that "determining whether a statute is content-based or content-neutral has not been entirely straightforward." 485 F.3d at 744. *Riel* analyzed and applied the framework that we set forth in *Rappa* for making this determination.

Rappa likewise involved a First Amendment challenge to outdoor sign ordinances. In seeking to determine "the current state of First Amendment law pertaining to outdoor signs," we discussed at length the Supreme Court's splintered decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981), which dealt with a San Diego ordinance regarding billboards. *Rappa*, 18 F.3d at 1047. We found that a clear governing standard could not be derived from the plurality and concurrence in *Metromedia* and concluded that, given significant differences between the ordinances at issue in both cases, the result in *Metromedia* did not control our decision in *Rappa*. *Id.* at 1061. Instead, we articulated and then applied a "context-sensitive" analysis for determining whether a restriction on speech, including a sign ordinance, is content-neutral or content-based. We explained in *Rappa* that "[s]ome signs are more important than others" because

> they are more related to the particular location than are other signs. Allowing such "context-sensitive" signs while banning others is not discriminating in favor of the content of these signs; rather, it is accommodating the special

> nature of such signs so that the messages they contain have an equal chance to be communicated.

Id. at 1064. As an example, we noted that "[a] sign identifying a commercial establishment is more important on its premises than is a sign advertising an unrelated product." *Id.*

Determining whether a sign is related to the location where it is placed inevitably demands a consideration of thesign's content. But this consideration does not by itself constitute a lack of neutrality as to specific content. Summing up our analysis, we held in *Rappa* that:

> [W]hen there is a significant relationship between the content of particular speech and a specific location or its use, the state can exempt from a general ban speech having that content so long as the state did not make the distinction in an attempt to censor certain viewpoints or to control what issues are appropriate for public debate and so long as the exception also survives the test proposed by the *Metromedia* concurrence: i.e., the state must show that the exception is substantially related to advancing an important state interest that is at least as important as the interests advanced by the underlying regulation, that the exception is no broader than necessary to advance the special goal, and that the exception is narrowly drawn so as to impinge as little as possible on the overall goal.

Id. at 1065 (internal footnotes omitted).[5] We outlined two ways through which the requirement that a sign be significantly related to a specific location might be satisfied. First, a sign could be particularly important to travelers on a nearby road, such as a directional sign. Second, it could be shown "that a sign better conveys its information in its particular location than it could anywhere else -- for example, an address sign." *Id.* Hence, as we summarized in *Riel*, the core of *Rappa's* holding is that exceptions such as those at issue in this case do not constitute content-based restrictions that we analyze using a strict scrutiny framework. Instead, we employ "a more flexible, context-specific approach." *Riel*, 485 F.3d at 746.

Before applying the *Rappa* framework to the ordinance in this case, we first frame the issue before us. The Pittsburgh Zoning Code bans what it defines as Advertising Signs from certain areas of the city, including those in which the buildings at issue in this case are located. However, the Zoning Code permits signs classified as Identification Signs within those same zoning districts. Ordinances that exempt identification signs from a general ban on signs represent "a classic application of *Rappa's* context-specific rule." *Id.* at 750. Such signs clearly better convey their information at the location they are intended to identify, rendering them similar to address signs. *Id.* They also promote public order by providing the public with information regarding specific buildings. *Id.* at 751.

The more complex issue in this case, however, is presented by the fact that Melrose seeks to classify its signs, which admittedly possess an advertising

component, as Identification Signs. It claims that the signs do not merely advertise a web address, but in fact name the buildings they adorn. The Zoning Code, by not allowing Advertising Signs within the relevant zoning districts, creates a general ban on advertising speech in those areas. However, the four criteria that the Zoning Board has articulated and applied in the Heinz Field case and in Melrose's cases allow for an exception to this general ban when such advertising is conveyed through a sign that, although it has advertising characteristics, remains a genuine Identification Sign.

As the Zoning Board declared in its decision approving the Heinz Field signs, "[w]here a sign has components of advertising and identification, we must determine whether the purported building identification is genuine or merely an effort to utilize the location as an advertising vehicle." (Supp. App. at 11.) The four criteria articulated by the Zoning Board for making this determination provide a framework for evaluating whether a "significant relationship" exists between the content of such signs and the specific location in which they are placed. *See Rappa*, 18 F.3d at 1066. There is no indication that the City sought to "censor certain viewpoints" when it articulated and applied these criteria. *Id.* at 1065. We therefore conclude that the city's four criteria satisfy the first part of the test we set forth in *Rappa*.

Accordingly, we proceed to the second portion of the *Rappa* framework. Here, we consider whether the Zoning Board's exception -- for certain Identification Signs that have an advertising component, but that by satisfying the four criteria indicate that they are still a

genuine Identification Sign -- survives the test set forth in the *Metromedia* concurrence. Under this test we first examine whether "the exception is substantially related to advancing an important state interest that is at least as important as the interests advanced by the underlying regulation." *Id.* The City clearly has an important interest in allowing the public to identify a particular name with a geographic location, enabling the public to recognize and find these locations.[6] A sign located at the structure that it names "better conveys its information in that location than it could anywhere else." *Riel*, 485 F.3d at 750. The four criteria serve this interest by creating a narrow exception that allows for a small number of Identification Signs, which also possess advertising aspects, when there are facts that indicate that the true intent behind the sign is to identify the premises where it is located and that the name depicted will remain constant for a significant period of time. The signs at issue in this case, which also possess advertising characteristics, create a tension between the City's aesthetic interest in limiting the proliferation of Advertising Signs, which the sign regulations advance, and its interest in allowing Identification Signs. *See Metromedia*, 453 U.S. at 507-08 (identifying the "appearance of the city" as a "substantial government goal[]"). The Zoning Board's four criteria set forth a reasoned framework for resolving this tension and allow for a narrow exception to the general ban on advertising when advertising is an aspect of a sign that is genuinely intended to be an Identification Sign and therefore serves important state interests, including "public order," *Riel*, 485 F.3d at 751, and "traffic safety," *Metromedia*, 453 U.S. at 507-08.

We recognize that naming rights represent a unique phenomenon. An entity that purchases such rights seeks to benefit not simply from having signs at the location that advertise its name, but also from having the public associate its name with the venue. As one commentator has observed:

Perhaps the single most important factor in a naming rights agreement is the understanding that the corporate sponsor's name will be used in association with the venue at all times by venue management and tenants. This use facilitates media usage in all communications and leads to recognition within the local as well as the national media. Compared with the traditional media advertising, where the broadcast of a thirty-second prime time television spot can cost $ 1-$ 2 million, it becomes apparent why naming rights are efficient marketing.Christian Maximillian Voigt, "*What's Really in the Package of a Naming Rights Deal?*" *Service Mark Rights and the Naming Rights of Professional Sports Stadiums*, 11 J. Intell. Prop. L. 327, 330 (2004) (internal footnotes omitted). Hence the purchase of naming rights can prove lucrative for a sponsor for reasons beyond whether or not the sponsor is able to have signs with its name erected on the facility's exterior. The exterior signs on such facilities do not, by themselves, "name" the venue, but instead aid the public in recognizing a specific destination. As such, they "promote public order by providing information about the building[]." *Riel*, 485 F.3d at 751.

We turn to the second and third portions of the test delineated in the *Metromedia* concurrence. We find that the Zoning Board's criteria create an "exception [that] is no broader than necessary" to allow for genuine

Identification Signs that possess an advertising aspect and that they are "narrowly drawn so as to impinge as little as possible on the overall goal" of preventing the proliferation of advertising signs in certain locales. *Rappa*, 18 F.3d at 1065. The four criteria narrowly tailor this exception by requiring applicants to show that such signs are intended to establish a generally recognized destination point of interest to a significant segment of the public; that they are intended to remain in place for a significant period of time, which will both establish and sustain the public's recognition of the destination point; and that the owner or principal user of the premises, who is likely to have a vested interest in the stability of its identification, possesses control over the signs.

These criteria serve to prevent a proliferation of Advertising Signs with rapidly changing content that purport to be Identification Signs. As such they are "narrowly drawn so as to impinge as little as possible on the overall goal" of the City's sign regulations. *Id.* at 1065. The longevity criteria and the requirement that the owner or principal user of a building possesses control over the sign reinforce the City's interest in allowing the public to associate a given name with a specific location and narrowly tailor the scope of this exception. Clearly, it behooves the owner or principal user of a building, particularly one who operates a business on the premise, to ensure that signs on the building remain consistent and that they allow the public to easily ascertain and remember its location. In *Metromedia*, the Supreme Court deemed it reasonable for a city to believe that "offsite advertising, with its periodically changing content, presents a more acute problem than does onsite advertising." 453 U.S. at 511

(citation omitted). Implicit in this statement is the assumption that onsite advertising, for a business at the location, will change less frequently than the contents of a commercial billboard at the same premises. Certainly a commercial tenant is not likely to move as frequently as a billboard might be changed for new advertising. Analogously, we find that the Zoning Board's concern with a building's owner or primary tenant having control over the content of signs, in conjunction with the other criteria, serves to ensure that the exception remains narrow. An owner or primary tenant would likely have more invested in ensuring that the signs that identify the premise remain stable than would a party with no interest in the premises beyond its control of the signs. In summary, we conclude that the Zoning Board's consideration of the content of signs with an advertising aspect, for the purpose of determining whether they satisfy these criteria and can properly be classified as Identification Signs, constitutes a "context-sensitive" analysis and is not improper.

Melrose's signs clearly fail to satisfy these criteria. No showing has been made of intended longevity. In fact, Melrose asserted its right to change the content of its signs as frequently as it wished. Nor is Melrose, which controls the signs, the owner of the buildings or their primary tenant. Finally, Melrose's contention that its proposed building names would serve the public interest by identifying specific geographic locations, for purposes including the calling of emergency assistance, is undermined by the fact that it sought to name three distinct buildings "palegalhelp.com." Accordingly, we find that Melrose failed by a wide margin to satisfy the four criteria.

We also reject Melrose's contention that the criteria created an impermissibly subjective or vague standard. The Supreme Court has held that "[a] government regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992) (internal quotation marks and citation omitted). This is true even for a facially neutral provision. *Riel*, 485 F.3d at 755. Accordingly, to avoid the danger of censorship, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority." *Forsyth County*, Ga., 505 U.S. at 131 (internal quotation marks and citation omitted). Permitting schemes under which decision makers are "guided only by their own ideas of public welfare, peace, safety, health, decency, good order, morals or convenience" have been rejected. *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 150, 89 S. Ct. 935, 22 L. Ed. 2d 162 (1969) (internal quotation marks omitted) (*quoted in Riel*, 485 F.3d at 755). In *Shuttlesworth*, the Court found unconstitutional a scheme that allowed the city commission to reject a parade permit if "in its judgment" any of these general concerns "require that it be refused." *Id.* at 150-51.

In contrast, in *Riel* we approved a permit standard that required an architectural review board to review sign and display applications "for conformity in exterior material composition, exterior structural design, external appearance and size of similar advertising or information media used in the architectural period of

the district in accordance with the Resource Inventory of building architectural styles of the [city's] Historic District." *Riel*, 485 F.3d at 755 (internal quotation marks and citation omitted). We found that this standard did not afford "unbridled discretion," but instead limited the review to consideration of certain identified factors. *Id.* at 756. The ordinance at issue also established certain objective standards for material, border, and typeface. Finally, we noted that the nine-member review board "guards against applicants being subjected to the whim or caprice of one single official." *Id.* Although some room for subjective judgment remained, "the First Amendment does not require the complete absence of such judgment." *Id.*

Applying this standard to the Pittsburgh Zoning Board's four criteria – which the Zoning Board has outlined in its decisions as the framework for determining whether a sign with an advertising aspect can still be classified as an Identification Sign -- we find that the criteria are not impermissibly vague or subjective. Instead, they represent "narrow, objective, and definite standards" that guide the Zoning Board's decision making. They do not leave this determination subject to a decision maker's judgment regarding expansive concepts such as "public welfare, peace, safety, health, decency, good order, morals or convenience." *Shuttlesworth*, 394 U.S. at 150. One criterion, which requires that the sign be controlled by an owner or principal user of the facility, provides an objectively verifiable standard. The other criteria are also narrow in scope, requiring an evaluation of definite factors including the intended longevity of the sign, the importance to the public of the location to be identified by the sign, and whether the sign's major purposes

include the establishment of a specific destination point to be generally recognized by the public at a set location.[7] Finally, the Zoning Board, which applies these criteria in reviewing the Zoning Administrator's decisions, is comprised of three members, which protects against the "whim or caprice of one single official." *Riel*, 485 F.3d at 756. We conclude that the criteria articulated and applied by the Zoning Board in this case do not confer "unbridled" discretion and are neither unconstitutionally subjective nor vague.

For these reasons, Melrose's First Amendment claims fail.

B. Melrose's Equal Protection Claim

Melrose also raises an equal protection challenge to the application of the Zoning Code to its sign applications.[8] It contends that the Zoning Board treated its applications differently than those for new signage at Heinz Field, PNC Park, Mellon Arena, and I.C. Light Amphitheater. According to Melrose's complaint, "large, corporate, commercial entities" are allowed to name buildings in Pittsburgh "without any restrictions," while Melrose is subject to "arbitrary, capricious and irrational discrimination." (J.A. at 144.) Melrose further insinuates in its brief on appeal that this allegedly disparate treatment was also motivated by the taxpayer funding of the construction of these other facilities.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons

similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (citation omitted). In *Congregation Kol Ami v. Abington Township*, we discussed the "two-step inquiry" outlined in *City of Cleburne* for reviewing an equal protection challenge to a zoning ordinance. 309 F.3d 120, 136-37 (3d Cir. 2002). This inquiry "properly places the initial burden on the complaining party first to demonstrate that it is 'similarly situated' to an entity that is being treated differently before the local municipality must offer a justification for its ordinance." *Id.* at 137. Our analysis in this case begins and ends at this first step. Melrose has clearly failed to establish that it is similarly situated to those entities whose signs have been approved. As outlined *supra*, Melrose's sign applications simply fail to satisfy the criteria outlined by the Zoning Board for determining whether a sign with advertising aspects can still properly be classified as an Identification Sign.

To the extent that Melrose challenges the criteria themselves, rather than their application to its cases, we reject this argument for the same reason we rejected Melrose's First Amendment claims. Having determined that the criteria are not content-based, but instead facilitate a contextual analysis, we find that they survive scrutiny under the Equal Protection Clause. *See Brown v. City of Pittsburgh*, 586 F.3d 263, 283 (3d Cir. 2009) ("[W]here the state shows a satisfactory rationale for a content-neutral time, place, and manner regulation, that regulation necessarily survives scrutiny under the Equal Protection Clause.") (internal quotation marks and citations omitted).[9]

IV.

For the foregoing reasons, we will affirm the District Court's decision granting summary judgment in favor of Defendants.

Footnotes

*Honorable Paul S. Diamond, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

1The first lease granted Melrose naming rights to 840 East Ohio Street for approximately fifteen years, from May 27, 1998 to June 30, 2013. The second lease, for 1025-1033 Beaver Avenue, was entered on July 8, 1998 and granted naming rights for seventy-two months. The third lease, executed on February 9, 1999, covered a fifteen-year term for the building at 818 East Ohio Street. An eighteen-year lease for naming rights was signed for the building at 1217 West Carson Street. The fifth lease was twenty-seven years in duration and applied to the building at 57 Bates Street.

2A second application for this building was later accepted, which changed the name to simply "Staiger."

3According to the December 14, 2001 Zoning Board of Adjustment ("Zoning Board") decision on the renaming of this building, there is no evidence of an application to designate this property "SSSP."

4*Central Hudson*, which the District Court applied in evaluating Melrose's claims, provides the framework for evaluating restrictions on commercial speech,

particularly restrictions that distinguish between commercial and non-commercial speech based on content. That is not the situation here. As we discuss more fully *infra*, we find that the Zoning Board's determination was not content-based, but instead constituted a context-sensitive analysis that sought to determine whether there was a significant relationship between the content of the signs and their specific location, such that they could truly be deemed Identification Signs.

5In *Rappa*, we described the *Metromedia* concurrence's test as "essentially a more stringent version of the time, place, and manner test." 18 F.3d at 1059 n.22. Accordingly, we need not separately apply that test in situations where the *Rappa* analysis is appropriate. *See Riel*, 485 F.3d at 751 (applying the "general test for time, place, and manner restrictions," rather than *Rappa*, when "an exemption is not even arguably based on the content of the speech").

6To the extent that Melrose contends that this exception is specifically directed at permitting the phenomenon of naming rights at large facilities, we also recognize an important state interest in facilitating such naming agreements. As the City stated at oral argument, both the City and the public at large have an important interest in enabling the construction of such facilities, which benefit from the financial support that derives from sponsorship agreements.

7Melrose specifically argues that the longevity requirement has been applied subjectively, citing other buildings that have had frequent name changes. This argument is unavailing; the names at the buildings cited

were changed when the building's major tenant changed. Longevity is not a general principle the Board applies to all signs, but rather a criterion it has chosen to apply in attempting to determine whether a sign that has an advertising component is still primarily an Identification Sign, rather than simply advertising. Accordingly, the failure to apply a longevity requirement to all signs in the City of Pittsburgh is not evidence of improper subjectivity.

8Melrose brings equal protection challenges pursuant to both the Fourteenth Amendment of the United States Constitution and Article 1, § 26 of the Pennsylvania Constitution. Our analysis of Melrose's federal equal protection claims is equally applicable to its equal protection claims under the Pennsylvania Constitution. *Kramer v. Workers' Comp. Appeal Bd.*, 584 Pa. 309, 883 A.2d 518, 532 (Pa. 2005); *see also Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 95 n.6 (3d Cir. 2009).

9Melrose briefly argues that the District Court made findings of fact that should have been left for the jury and not resolved at summary judgment. However, Melrose fails to actually identify any material factual determinations made by the District Court. Accordingly, we find this argument to be without merit.

Civil Action No. 02-1161
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MELROSE, INC., Plaintiff,

vs.

CITY OF PITTSBURGH, CITY OF PITTSBURGH ZONING BOARD OF ADJUSTMENT, CLIFFORD B. LEVINE, ESQ., REGIS D. MURRIN, ESQ., and JESSE W. FIFE, JR., Defendants.

September 30, 2008, Decided
September 30, 2008, Filed

MEMORANDUM OPINION

CONTI, District Judge

Melrose, Inc. ("Melrose" or "plaintiff"), a Pennsylvania corporation engaged in the business of acquiring and leasing naming rights to buildings in Pittsburgh, Pennsylvania, filed suit alleging that defendants City of Pittsburgh (the "City"), City of Pittsburgh Zoning Board of Adjustment (the "Zoning Board"), Clifford B. Levine ("Levine"), Regis D. Murrin ("Murrin"), and Jesse W. Fife ("Fife," together with the City, the Zoning Board, Levine, and Murrin collectively "defendants") violated its First and Fourteenth Amendment rights by arbitrarily denying Melrose permits to display signs on buildings for which it held the naming rights. (Pl.'s Concise Statement of Undisputed Facts in Support of Its motion for Partial Summary Judgment ("Pl.'s Facts") ¶¶1, 4.) The denials

were based upon the conclusion of the Zoning Board that the signs were not "bona fide Identification Sign[s]" within the meaning of the Pittsburgh Zoning Code, PITTSBURGH, PA., ZONING CODE § 919 (1999) (the "Zoning Code"), "but rather in the nature of creative plan or strategy of evasion to avoid the valid restrictions that [the Zoning Code] places upon Advertising Signs." (Pl.'s App. Ex. F at 238a.)

On April 14, 2003, this case was referred to a United States Magistrate Judge for pretrial proceedings in accordance with the Magistrate Judges Act, 28 U.S.C. §§ 636(b)(1)(A)-(B), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrate Judges. On May 23, 2008, the magistrate judge issued a report and recommendation (Doc. No. 89 (the "R & R")) regarding the motion for summary judgment (Doc. No. 75) filed by defendants and the motion for partial summary judgment (Doc. No. 80) filed by the plaintiff. The magistrate judge recommended that the district court grant defendants' motion for summary judgment, and deny Melrose's motion for partial summary judgment. Service of the R & R was made on the parties. Objections (Doc. No. 90) were filed by Melrose on June 9, 2008, and a response to objections (Doc. No. 91) was filed by defendants on June 16, 2008. After a de novo review of the record including the plaintiff's objections, and defendants' response, the court will adopt in part and reject in part the magistrate judge's R & R as set forth below. Defendants' motion for summary judgment will be granted and plaintiff's motion for partial summary judgment will be denied.

Plaintiff avers three basic claims in the complaint based upon defendants' denial of five separate signage

applications for buildings in the City. Plaintiff asserts the following two claims pursuant to 42 U.S.C. § 1983 ("section 1983"): 1) defendants allegedly deprived plaintiff of the First Amendment right to free speech by impermissibly limiting the content of its building identification signs; and 2) defendants allegedly deprived plaintiff of the Fourteenth Amendment right to equal protection of the laws by treating similarly situated entities in a more favorable manner. Plaintiff's third claim is brought pursuant to article 1, section 26 of the Pennsylvania Constitution by reason of defendants allegedly depriving plaintiff of rights granted under the equal protection clause of the Pennsylvania Constitution.

The court rejects the portion of the R & R finding plaintiff's proposed building names misleading. The court adopts all other portions of the R & R. Summary judgment will be granted in favor of defendants with respect to plaintiff's section 1983 First Amendment claims, section 1983 Fourteenth Amendment Equal Protection Clause claims, and Pennsylvania constitutional claims brought pursuant to article 1, section 26 of the Pennsylvania Constitution.

For ease of reference the factual background, adopted in part from the R & R, will be addressed below.

I. FACTUAL BACKGROUND

During the period from May 1998 to February 1999, Melrose executed lease agreements with the owners of five Pittsburgh buildings. [1] (Pl.'s Facts ¶ 5.) Each lease granted Melrose the right to name the building and to construct and display signage on the building reflecting

that name. (Pl.'s App. Ex. D at 205a-17a.) The first lease granted Melrose naming rights to the premises located at 840 East Ohio Street, Pittsburgh, Pennsylvania, from May 27, 1998 until June 30, 2013. (Pl.'s App. Ex. E at 30.) On July 8, 1998, Melrose entered into a seventy-two month lease which granted Melrose the "authorization for property naming rights" for the building located at 568 Lincoln Avenue, Pittsburgh, Pennsylvania. Id. at 42-43. A third lease covering a fifteen-year term was executed on February 9, 1999, for the building located at 818 East Ohio Street, Pittsburgh, Pennsylvania. Id. at 32. A fourth eighteen-year lease gave Melrose the naming rights to premises located on West Carson Street, Pittsburgh, Pennsylvania. (Def. App. Ex. L.) The fifth lease executed by Melrose was a twenty-seven year lease which granted it "exclusive rights and appurtenances for the naming and/ or renaming of the property [located at 57 Bates Street, Pittsburgh, Pennsylvania]." (Pl.'s App. Ex. D at 215a-17a). The leases did not limit the number of times or how often Melrose was entitled to change the buildings' names.

In February 1999, Melrose filed applications for signage approval with the City' zoning administrator (the "Zoning Administrator"). (Pl.'s Ex. F at 243a). The application process was uneventful. (Pl.'s Facts ¶¶ 57-65.) The Zoning Administrator approved the names, location, size and shape of the signs for each of the applications. [2] (Def. App. Ex. F(f) at 1). All five buildings were in zoning districts where the Zoning Code generally prohibited advertising signs, but which permitted business signs and identification signs. [3] (Defs.' Concise Statement of Facts in Support of Motion for Summary Judgement ("Defs.' Facts") ¶ 5.)

The applicable section of the Zoning Code in effect at the time of these applications (section 919.01.C) distinguished among different kinds of signs, in relevant part, as follows:

> 2. Advertising Sign means a sign that directs attention to a business, commodity, service or entertainment, conducted, sold or offered:
>
> (a) Only elsewhere than upon the premises where the sign is displayed; or (b) As a minor and incidental activity upon the premises where the sign is displayed.
>
> 3. Business Sign means a sign that directs attention to a business, profession, or industry located upon the premises where the sign is displayed; to the type of products sold, manufactured, or assembled; and/or to the service or entertainment offered on such premises; except a sign pertaining to the preceding if such activity is only minor and incidental to the principal use of the premises.
>
> 4. Identification Sign means a sign used to identify the name of the individual or organization occupying the premises; the profession of the occupant, the name of the building on which the sign is displayed; or the name of the major enterprise or principal product or service on the premises.

PITTSBURGH, PA., ZONING CODE § 919.01.C (1999);(Pl.'s App. Ex. A at 3a-4a.) Under the Zoning Code, advertising signs, regulated pursuant to section

919.02 of the Zoning Code, were subject to more rigorous requirements with respect to location, placement, size, and shape than were non-advertising signs, which were regulated pursuant to section 919.03 of the Zoning Code. Id. § 919.

The Zoning Administrator approved a sign that read "Ram Staiger" for the premises at 840 East Ohio Street as an identification sign. "Ram" was a business's name. Staiger was the building owner's name. (Defs.' App. Ex. F(5) at 5.) The premises at 818 East Ohio Street were named "Caskey Limited" after a girlfriend of a Melrose officer, and an identification sign with that name was approved for the premises. (Defs.' App. Ex. F(3) at 10.) Melrose's application for a building identification sign at the West Carson Street premises identifying "Three Rivers Building" as the name of the building was approved, as was the request for an identification sign at 57 Bates Street designating "The Cole Building" as the name of the building. The Cole Building was named for the son of a Melrose officer. (Defs.' App. Ex. F(5) at 14.) Melrose constructed and installed signs reflecting the assigned names. [4]

On March 21, 2001, Melrose submitted applications to the Zoning Administrator to rename the five buildings and change the signage. (Pl.'s App. Ex. E at 218a-34a.) Melrose proposed that The Cole Building be renamed "WEHIRENURSES.COM BUILDING," that the SSPP and Caskey Limited buildings be renamed "PALEGALHELP.COM" and that the name of the Ram Staiger building be changed to "BARUCH ATAH HASHEM." [5] (Id.) Melrose also submitted a signage application for the Three Rivers Building, but did not specify in the application a new name for that building.

(Id.) Melrose did not propose in any of the March 21, 2001 applications to change the location, size or shape of the identification signs on the buildings; it sought only to change the content of the signs to reflect the new names by changing the vinyl front face of the signs. (Defs.' App. Ex. F(4) at 1-2.)

The Zoning Administrator notified Melrose that each of its name change requests was denied because the proposed signs constituted advertising rather than identification. (Pl.'s Facts ¶¶ 71-85.) On April 18, 2001, Melrose appealed the Zoning Administrator's decisions to the Zoning Board. (Id. ¶ 87.) The five cases were consolidated, and hearings were held on May 24 and June 21, 2001. (Defs.' App. Ex. A at 1.) The parties stipulated that the testimony and evidence produced in each individual case would be applicable to all Melrose's cases. (Defs.' App. Ex. F(1) at 5). On December 7, 2001, the Zoning Board issued five decisions denying Melrose's five appeals. (Pl.'s App. Ex. 5 at 238a-61a.)

Melrose's proposals to rename two of the buildings "PALEGALHELP.COM" and another "WEHIRENURSES.COM BUILDING" were rejected because the Zoning Board found that the proposed signs were not bona fide identification signs. The Zoning Board concluded those proposals were "in the nature of a creative plan or strategy of evasion to avoid the valid restrictions which Chapter 919 place[s] upon advertising signs." (Pl.'s App. Ex. F at 244a.)

Some exceptions to the Zoning Code had been previously granted with respect to identification sign applications which met the definition of advertising signs. Signs identifying the building names of Heinz

Field, PNC Park, Mellon Arena, and I.C. Light Amphitheater (which later changed its name to Chevrolet Amphitheater) were approved by the Zoning Board as identification signs despite their substantial interest in off-site advertising. (Pl.'s Facts ¶¶ 99-101.) None of the businesses identified in those names conducted substantial business on-sight and their signage on the buildings would not qualify for on-site advertising signs or for business identification signs as described in the Zoning Code.

The process for approval of the signage of those buildings is exemplified by the application for the Heinz Field name. In 2001, Pittsburgh Steelers Sports Inc. (the "Steelers") applied for approval of 47 various identification signs. The signs identified the newly erected football stadium as Heinz Field pursuant to a marketing and naming rights agreement between the Steelers and the H. J. Heinz Company. (Defs.' App. Ex. C at 5.) The Steelers also applied for approval for various signs identifying a portion of the stadium as the Coca-Cola Great Hall pursuant to a marketing agreement between the Steelers and the Coca-Cola Corporation. (Id.) The Zoning Administrator denied the Steelers's applications for 19 of the proposed signs including the proposal for the Coca-Cola Great Hall, and the Steelers appealed those decisions to the Zoning Board.

Several local community groups objected to the proposed signage, including the Allegheny West Civic Council, and on August 9, 2001, a hearing was held before the Zoning Board. (Id.) In a decision dated November 15, 2001, the Zoning Board approved the Steelers's application for the Heinz Field signs as

identification signs, but denied the application for the Coca-Cola Great Hall signs. (Id. at 12.) The Zoning Board did not allow the signs with the Coca-Cola Great Hall lettering because the signs would constitute advertising signs and "Great Hall" was not the name of the building. (Id. at 17.) Through previous and subsequent negotiations and correspondence among the Steelers, the Sports and Exhibition Authority, the city planning commission, and members of the Zoning Board, the Steelers were successful in having the Zoning Code amended in 2002 to allow the Coca-Cola Great Hall signage. (Pl.'s Facts P 92.) Melrose did not receive the same cooperation from city officials or the Zoning Board. (Pl.'s Facts ¶ 98.)

In its decision approving the Heinz Field signs and categorizing the signs as identification signs rather than advertising signs the Zoning Board acknowledged the advertising aspect inherent in naming rights:

> Heinz is spending $ 57 million dollars to obtain stadium naming rights and related endorsements. The very rationale for purchasing naming rights of a sporting facility is to obtain name identification that will sustain or increase market share. We thus recognize that there is an advertising component inherent in the sale of naming rights.

(Defs.' App. Ex. H at 10.) Distinguishing between "genuine" identification signs which have an advertising component and advertising signs that do not qualify as identification signs, the Zoning Board - approximately four months prior to its denial of Melrose's March 21,

2001 applications - identified criteria to be considered in an interim decision dated August 15, 2001:

> First - One of its major purposes of or result of a sign must be to establish a destination point that will be generally recognized by the public as being at a specific geographical location.
>
> Second - Such established location must be important to or of interest to a material segment of the public whether the designated facility is one of culture, art, architecture, sports, office, business or other commercial or nonprofit uses.
>
> Third - there must be evidence of intended longevity of the sign adequate to sustain the designated point concept. It can not be as transitory as a commercial billboard. However, it need not be immune from unexpected, unforeseen or unwelcome circumstances that might result in a termination.
>
> Fourth - Either the owner of the facility or a principal user thereof should be in control of the destiny of any such sign rather than having control turned over to some third party.

(Interim Decision in Zoning Case 85 of 2001, the matter involving construction of signage at Heinz Field ("Interim Decision") at 10-11(emphasis added).) The Zoning Board cited these criteria in its decisions in the Melrose cases. (See Defs.' App. Exs. A-E.)

The Zoning Board expressed concern with the longevity requirement of the third criteria in the

decisions relating to Melrose's March 21, 2001 applications [6] and noted that "transfer of the building identification rights and the signs reflecting same to a third party who may change such identification for commercial purposes when and so often as it desires," was inconsistent with the purpose of building identification signs - directing the public to a specific geographical location. (Pl.'s App. Ex. F at 244a.) While conceding that the Zoning Code does not restrict a property owner's right to select a building name, the Zoning Board held that when a building identification sign conflicts with the City's proper regulation of signs, "the Zoning Board is obligated to consider the intention of City Council in formulating Chapter 919 of the Zoning Code in its entirety." (Id. at 243a.) The Zoning Board stated that failure to adhere to these criteria:

> would thwart the intention of Council reflected in Code §§919.01A.1 1 and 12 which "recognize that advertising signs are a legitimate advertising medium to be placed in the locations which neither lessen the visual attributes of the City through the placement of such signs, nor cause confusion, safety problems or lessen the ability to identify local businesses through visual clutter; [and to] regulate advertising signs or billboards within the City in the interests of economic prosperity, civic pride, quality of life and general welfare of the people who reside in, are visiting, are employed in or conduct business in the City."

(Id.) The Zoning Board found the Melrose applications to be for improper building identification signs because:

> (1) the sign content was limited to web addresses for profit-making ventures; (2) the proposed name for the building had "no relationship to the owner or to any tenant [or enterprise located] within the building;" (3) the sign was intended to direct readers to a for-profit website business; (4) neither the owner nor any principal tenant of the building exercised control over the sign or its content; and (5) there was no indication that the name assigned to the building would remain in place for any length of time.

(Id. at 244a (emphasis added).)

Melrose presented no evidence that the names for the buildings in issue would remain the same for any substantial period of time. The only indication of the length of time that Melrose intended to keep the names for the buildings and the relevant signage the same came during this brief exchange at the hearing:

> Board Member Levine: Do you plan to change the name of the building from time to time?
>
> Counsel for Melrose: We might from time to time.
>
> Board Member Levine: And really, under your theory, there is no limit. Because any name that you might want to name it, you have the right to name it because you own that part of the building or at least. Counsel for Melrose: Just as I can call my building Nernberg Building, 301 Smith Street Building, the Legal Services Building, or any other name that I want to put on

> it. Unless Heinz objects to me calling it the Heinz Building, I would have the right to name that building in any way I want. If I want to name it after my great-grandmother or name it after - my wife's first name or anything else that I want to do, in short, yes, we have an absolute right to name the building any way we want, and especially under the ordinance, and that is the crux of the issue.

(Defs.' App. Ex. F(2) at 33.) In contrast the Zoning Board in the decision approving the Steelers's application noted: "The Steelers entered into a 'Sponsorship Agreement' with the H. J. Heinz Company . . . whereby the name of the football stadium would be known as 'Heinz Field' for a period of at least 20 years." (Pl.'s App. Ex. G at 302a.)

The Zoning Board also rejected Melrose's application to change the name and signage on one of the buildings to "BARUCH ATAH HASHEM" for substantially the same reasons that the other applications were denied. (Defs.' App. Ex. B at 4.) The City sent a letter to the Zoning Board advising the Zoning Board that there was no legal basis to reject the application for "BARUCH ATAH HASHEM" because it had no advertising component and was a valid building name. (Pl.'s App. Ex. E at 235a.) The Zoning Board denied the application without addressing the City's position. (Id. at 236a.) When the Zoning Board denied the name change, however, it recognized that there were constitutional issues relating to the religious message of the sign, and invited Melrose to reapply free of charge and brief the constitutional implications raised by this application. (Id.)

The Zoning Board's fifth decision addressed Melrose's application to change the name on one of the building signs without designating the new name. Stating that "the Zoning Administrator should not have made a decision or determination as to the subject application until it was completed . . . ," the Zoning Board remanded this case to the Zoning Administrator in order for Melrose to submit an amended application. (Defs.' App. Ex. D at 3.) Melrose did not pursue this case and the issue concerning that application is not before this court.

II. STANDARD OF REVIEW

The Federal Magistrate Judges Act, 28 U.S.C. §§ 631 *et seq.*, establishes the standard which governs this court's review of a report and recommendation filed by a magistrate judge. The relevant statutory language provides:

> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

28 U.S.C. § 636(b)(1).

Because the R & R at issue concerns a motion for summary judgment, the court must proceed with the applicable summary judgment standard in mind. Federal Rule of Civil Procedure 56(c) provides that summary judgment may be granted if, drawing all inferences in favor of the nonmoving party, "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A motion for summary judgment will not be defeated by the mere existence of some disputed facts, but will be defeated when there is a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In determining whether the dispute is genuine, the court's function is not to weigh the evidence or to determine the truth of the matter, but only to determine whether the evidence of record is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* at 249. The court is to draw all reasonable inferences in favor of the nonmoving party. *El v. Southeastern Pa. Transp. Auth.*, 479 F.3d 232, 238 (3d Cir. 2007)("In considering the evidence, the court should draw all reasonable inferences against the moving party."). The United States Court of Appeals for the Third Circuit has stated:

> [I]f there is a chance that a reasonable factfinder would not accept a moving party's necessary propositions of fact, pre-trial judgment cannot be granted. Specious objections will not, of course, defeat a motion for summary judgment, but real questions about credibility, gaps in the evidence,

> and doubts as to the sufficiency of the movant's proof, will.

Id.

III. DISCUSSION

Plaintiff raised several objections to the R & R. Plaintiff claims the magistrate judge erred by: 1) misapplying the four-part Central Hudson test; 2) not granting partial summary judgment for at least the "Baruch Atah Hashem" application which is not advertising; 3) improperly rejecting Melrose's as applied vagueness challenge to the ordinance; 4) improperly applying principles of statutory construction in interpreting the ordinance; 5) improperly analyzing plaintiff's procedural due process claim; and 6) failing to note the lack of response by defendant to plaintiff's concise statement of facts. Each objection will be addressed. The court will also consider, assuming one of Melrose's claims could survive summary judgment, whether the individual defendants are entitled to immunity and should be dismissed from this case.

A. PLAINTIFF'S OBJECTIONS

1. Whether the Magistrate Judge Misapplied the Central Hudson Test

The parties do not dispute that the applications for the names "PALEGALHELP.COM" and "WEHIRENURSES.COM BUILDING" implicate pure commercial speech and that the test articulated by the Supreme Court in *Central Hudson Gas & Electric*

Corp. v. Public Commission of New York, 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980), set forth the legal framework for assessing content-neutral restrictions on pure commercial speech. Under *Central Hudson*, courts evaluating restrictions on commercial speech must determine whether: (1) the speech at issue concerns lawful activity and is not misleading; (2) the asserted governmental interest is substantial; (3) if the first two criteria are met, the regulation directly advances the governmental interest asserted; and (4) the regulation is no more extensive than necessary to serve that interest. This test applies "to restrictions on commercial speech even in cases of alleged viewpoint discrimination." *Eller Media Co. v. City of Oakland*, No. C 98-02237, 2000 U.S. Dist. LEXIS 22006, 2000 WL 33376585, at *4 (N.D. Cal. Dec. 7, 2000) (citing *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 184, 119 S. Ct. 1923, 144 L. Ed. 2d 161 (1999)).

Plaintiff objected to the magistrate judge's application of the first, third and fourth prongs of the Central Hudson test with respect to the change of the building names to "PALEGALHELP.COM" and "WEHIRENURSES.COM BUILDING." Specifically, plaintiff argues that the magistrate judge erred by: finding the proposed names "misleading," finding that the ordinance directly advanced the governmental interest asserted, and finding that the ordinance was no more extensive than necessary to advance the government interest. Each argument will in turn be addressed.

a. Whether the Proposed Names Were Illegal or Misleading

Melrose disagrees with the magistrate judge's recommendation that this court find that Melrose's proposed building names "PALEGALHELP.COM" and "WEHIRENURSES.COM BUILDING" were misleading as a matter of law under the first prong of the four-part test set forth in Central Hudson. The court agrees with plaintiff that those proposed building names were not illegal or misleading as required under the first prong of the *Central Hudson* test.

The first prong of the Central Hudson test requires that "the speech at issue concerns lawful activity and is not misleading." *Central Hudson*, 447 U. S. at 566. The evidence of record shows that Melrose owns the buildings or has a contract with the owners of the buildings to name and put the building names on a sign. There were no allegations or intimations that the proposed signs infringed any copyright or trademark laws or that they violated any obscenity or similar laws that might apply to commercial speech. The signs did not advocate any illegal activity

There was no evidence that the signs would be misleading or somehow constitute deceptive advertising. Inherent in the business of naming a building is the possibility that there may be confusion when a sign is erected identifying a building or venue for the first time when the name is not necessarily associated with any activities going on in the building. This confusion is the same whether the name is Heinz Field, PNC Park, Mellon Arena, PPG, Gateway Towers, Gateway Center, Law and Finance, or WEHIRENURSES.COM BUILDING. After a sign identifying the building is displayed to the public for a period of time, however, the public will come to

associate the name with the building and any confusion will be assuaged. No reasonable jury could conclude that this somewhat minor level of confusion rises to the level of deception contemplated by the Court in *Central Hudson*. *Central Hudson*, 447 U.S. at 563 ("The government may ban forms of communication more likely to deceive the public than to inform it.").

This conclusion does not change the outcome for any of plaintiff's claims. After recommending a finding that the signs were misleading as a matter of law, the magistrate judge declined to truncate the Central Hudson analysis based upon the first prong of the test, and evaluated each of the remaining Central Hudson factors assuming that the first prong was met.

b. Whether the Ordinance Directly Advanced the City's Asserted Interest

Melrose argues that the magistrate judge failed to analyze fully the third step of the Central Hudson test. The magistrate judge devoted nearly half of the R & R to this issue. The third step of the *Central Hudson* test requires that: "if the first two criteria are met, the regulation directly advances the governmental interest asserted." Id. In analyzing the third Central Hudson factor, the R & R explained the neutral criteria articulated by the Zoning Board to differentiate building identification signs from advertising signs. It can not be disputed that the City has a substantial interest in limiting the proliferation of signs in any particular zone in the City and in the public being able to identify a building name with a particular location. In the areas in question in Melrose's applications, the City chose to meet those interests by either severely

limiting or banning off-site advertising signs and imposing limitations for building identification signs.

When the Zoning Board was faced with a situation where a proposed sign could be considered an advertising sign or a building identification sign, the Zoning Board articulated several criteria which were relevant to advance the City's interest in maintaining the purpose of building identification signs - identifying a particular building with a name in order for the public to associate a name with a particular geographic location. None of these criteria was dependant upon the message of the name, the source of the message or the viewpoint represented. The single criterion that distinguished Melrose's signs from signs such as those posted at PNC Park, Mellon Arena, and Heinz Field was the longevity requirement. While Melrose is free to name a building "WEHIRENURSES.COM BUILDING" or "PALEGALHELP.COM," it must make a commitment to keep the name on the relevant sign for some period of time sufficient for the public to identify the building's name with its location. This requirement directly advanced the City's interest in having the public associate a particular name with a building or location without favoring any particular viewpoint or message. This requirement also advanced the City's interest in limiting the proliferation of signs in general and advertising signs in particular.

c. Whether the Regulation Was More Extensive than Necessary

The fourth prong of the Central Hudson test requires that "the regulation is no more extensive than necessary to serve [the government's asserted]

interest." *Central Hudson*, 447 U.S. at 566. Melrose contends that the magistrate judge "converted the relevant question from 'was the regulation broader than necessary' to 'whether the regulation was reasonable.'" (Pl.'s Objections to the R & R ("Pl.'s Objs.") at 17.) The relevant case law makes clear that the magistrate judge did not convert the test. In Central Hudson, the Court defined the fourth prong inquiry as whether the speech restriction is "more extensive than necessary to serve" the interests that support it. *Central Hudson*, 447 U. S. at 566. In *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989), the Court clarified that the fit between speech regulation and the governmental interest need not be perfect, only "reasonable."

Melrose next challenges the magistrate judge's "astounding assertion" that Melrose had not suggested what lesser burden on commercial speech might have been imposed. (Pl.'s Objs. at 17.) A close reading of plaintiff's brief shows that Melrose *did* suggest imposition of a lesser burden: it suggested that its speech not be regulated at all. "[S]igns that satisfied the Advertising Sign definition, but that did not contain a building name could have been restricted without concern for vagueness or viewpoint discrimination." Id. This argument was fully considered and rejected by the magistrate judge. This court does not find any error in the magistrate judge's application of the fourth prong of the *Central Hudson* test with respect to Melrose's applications for the building names "WEHIRENURSES.COM BUILDING" and "PALEGALHELP.COM."

2. Whether the Application for 840 East Ohio Street - "Baruch Atah Hashem" Should Have Been Approved

Plaintiff asserts that partial summary judgment should be granted in favor of plaintiff for the "Baruch Atah Hashem" signage because it was a religious message and did not constitute advertising under the Zoning Code. The magistrate judge noted that the Zoning Board invited Melrose to reapply free of charge if it wanted to further brief the issues raised by this application for 840 East Ohio Street. Melrose did not reapply, but sought review of the denial of the application in this court. In its objection, Melrose cited evidence which it claimed showed that appropriate administrative remedies were not available. Melrose cited correspondence between the City (through its solicitor) and the Zoning Board (co-defendants in this case) which reflected that the City advised the Zoning Board that there was no legal basis to reject the application for "BARUCH ATAH HASHEM" because it had no advertising component and was a valid building name. (Pl.'s App. Ex. E at 235a.) The Zoning Board denied the application without addressing the City's position. (Id. at 236a.) The court notes that the correspondence between the City and the Zoning Board took place before the Zoning Board's decision on the application. In its decision, the Zoning Board noted the unique constitutional implications raised because of the religious message involved, but declined to reach the constitutional issues without proper briefing.

Because Melrose did not reapply, the Zoning Board did not reach the merits of the constitutional claim. Under those circumstances, the court cannot guess what the Zoning Board's decision would have been if Melrose had

reapplied. The Zoning Board admitted that the message "Baruch Atah Hashem" was not a commercial message and did not qualify as an advertising sign, but it quoted at length portions of the other Melrose decisions distinguishing advertising signs from building identifications signs. It is not clear from the Zoning Board's decision whether the decision was 1) content based - the proposed signage was invalid as a building identification sign, because it contained a religious message - or 2) content neutral - the proposed signage was invalid as a building identification sign, because it lacked the same longevity requirements as the other applications. This distinction is important because the standard to be applied for noncommercial speech, such as that implicated with the name "Baruch Atah Hashem," is different from the standard for commercial speech. *Rappa v. New Castle County*, 18 F.3d 1043, 1053 (3d Cir. 1994). If the Zoning Board's decision was content based the court must apply a strict scrutiny standard and the Zoning Board must show that the "'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Id.* (quoting *Boos v. Barry*, 485 U.S. 312, 321, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988)). If the Zoning Board's decision was content neutral, the Zoning Board can institute reasonable time, place or manner restrictions which are "'narrowly tailored to serve a significant governmental interest,'" and "'leave open ample alternative channels for communication of the information.'" *Id.* at 1054 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984)). Because Melrose did not reapply - as it was invited to by the Zoning Board - and the Zoning Board did not reach these issues, Melrose's objections to the Zoning Board's decision concerning

the application for signage at 840 East Ohio Street, Pittsburgh, Pennsylvania is not properly before this court.

3. Whether the Zoning Code's Definition of "Building Identification Sign" is Overly Vague

Melrose argues that the magistrate judge improperly rejected Melrose's as applied vagueness challenge to the term "Building Identification Sign." This court agrees with the magistrate judge that the Zoning Code's definition for building identification signs was not unconstitutionally vague on its face or as applied.

A statute may be invalidated if it fails to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits or if it authorizes or encourages arbitrary and discriminatory application. *City of Chicago v. Morales*, 527 U.S. 41, 56, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999). "A statute is void for vagueness if it forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *ACLU v. Ashcroft*, 322 F.3d 240, 268 n. 37 (3d Cir. 2003) (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). A statute is not vague because of the possibility that it may be difficult to determine whether the fact in question has been proven, but would be vague because of "the indeterminacy of precisely what that fact is." *United States v. Williams*, 128 S. Ct. 1830, 1846, 170 L. Ed. 2d 650 (2008). For a plaintiff to succeed in proving a statute is overly vague, the plaintiff must establish that the statute did not provide "fair notice of what is prohibited, or is so standard less that it authorizes or

encourages seriously discriminatory enforcement." *Id.* at 1845.

In this case, plaintiff claims that the criteria relied upon by the Zoning Board in upholding the denial of Melrose's proposed signage were unconstitutionally vague. Specifically, plaintiff contends that the requirement that "there must be evidence of intended longevity of the sign adequate to sustain the designated point concept" is unconstitutionally vague. Nowhere in the ordinance is there a requirement that a building identification sign must be posted for a certain length of time or how long it would take to "sustain the designated point concept." Plaintiff claims that this lack of specificity encourages subjective and discriminatory application of the statute and points to the approval of the Steelers's proposed signage for Heinz Field as an example of the Zoning Board applying the statute unfairly in favor of large and popular corporations. This court disagrees. When a building identification sign also qualifies as an advertising sign, the Zoning Board set forth appropriate criteria to determine whether the identification purpose predominates over the advertising purpose. In applying a longevity requirement, the Zoning Board specified that, "[I]f can not be as transitory as a commercial billboard. However, it need not be immune from unexpected, unforeseen or unwelcome circumstances that might result in a termination." (Interim Decision at 11.) There is no requirement that a statute must set forth a bright line test or mathematical formula in order to pass constitutional muster. In setting forth specific criteria, the Zoning Board clarified how the ordinance would be applied. In this case, the Zoning Board's criteria gave plaintiff fair notice about what the ordinance required.

Plaintiff chose not to reapply and include appropriate commitments regarding the intended longevity of the building names. The Zoning Code as applied was not unconstitutionally vague.

4. Whether the Magistrate Judge Correctly Applied Principles of Statutory Construction

Melrose alleges that the magistrate judge failed to follow the holding in *Fidler v. Zoning Board of Adjustment of Upper Macungie Twp.*, 408 Pa. 260, 182 A.2d 692, 693, 54 Mun. L Rep. 45 (Pa. 1962). Melrose summarizes that holding as follows:

> [Restrictions imposed by zoning ordinances are in derogation of the common law and must be strictly construed . . . .Such restrictions must not be so construed as to fetter the use of land by implication. The permissive widest use of the land is the rule and not the exception, *unless specifically restrained in a valid and reasonable exercise of the police power.*

Id. (emphasis added) (internal citations omitted).

This argument misapprehends the role of the federal court in this case, which is to evaluate Melrose's constitutional claims. This court does not supplant the role of the Pennsylvania courts which may determine whether the Zoning Board complied with or properly interpreted applicable ordinances or properly observed state law in evaluating restrictions imposed by zoning ordinances. This court looks exclusively at whether the actions taken by the Zoning Board transgressed Melrose's constitutional rights as alleged in its

complaint.

The magistrate judge evaluated the alleged state and federal constitutional violations against the background of the record, and, in concluding that Melrose's rights had not been violated, thoroughly explained the rationale for the recommendations. The magistrate judge's analysis did not depend upon a construction of a state statute. The court's task is to determine whether the statutory construction applied by the Zoning Board, and the reasons underlying its disposition of the Melrose cases rose to the level of a constitutional violation. They did not. Whether there may have been some other violation of state law was not raised in the complaint. Under those circumstances, this court need not consider this objection.

5. Whether the Procedural Due Process Claim was Improperly Rejected

Melrose contends that the magistrate judge's brief treatment of its procedural due process claim was contrary to law and logic. In reality, the due process claim need not have been addressed at all. Plaintiff failed to raise a procedural due process claim in its complaint or in any document filed over the next five years. The issue was first raised, almost as an afterthought, in its Memorandum of Law in Opposition to Defendants' Summary Judgment Motion (Doc. 87 at 11.) Melrose wrote: "The focus of Defendants' due process discussion is on substantive due process. They fail, however, to address procedural due process." (*Id.*) Presumably, defendants did not address that argument because it had not been raised.

It is well established that a plaintiff may not attempt to amend a complaint through a brief in opposition to a motion for summary judgment. See *Sgro v. Bloomberg L.P.*, Civ.No. 05-731, 2008 U.S. Dist. LEXIS 27175, 2008 WL 918491, at * 18 n.16 (D.N.J. Mar. 31, 2008) (citing *Bey v. Daimler Chrysler Serve. of N. Am., LLC*, No. 04-6186, 2006 U.S. Dist. LEXIS 8261, 2006 WL 361385 *33 (D. N.J. Feb. 15, 2006) ("claims [that] were not alleged in the complaint cannot be raised for the first time in opposition to a motion for summary judgment"); see, e.g., *Gilmore v. Gates, McDonald & Co.*, 382 F. 3d 1312, 1315 (11th Cir. 2004) ("At the summary judgment stage, the proper procedure for plaintiffs to assert a new claim is to amend the complaint in accordance with Fed.R.Civ.P. 15(a)."); *Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996) ("A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment."); *Fisher v. Metro. Life Ins. Co.*, 895 F.2d 1073, 1078 (5th Cir. 1990)). This issue is not properly before the court.

6. Whether Defendants' Failure to Respond to Plaintiff's Concise Statement of Undisputed Facts was Dispositive

Plaintiff correctly notes that the magistrate judge failed to address defendants' failure to file a responsive concise statement as required by this district court's Local Rule 56.1.C, and that, as a result, the court may deem plaintiff's statement of material facts undisputed. W.D.PA.L.R. 56.1.E; see, e.g., *Bronson v. White*, Civ. No. 05-2150, 2007 U.S. Dist. LEXIS 76685, 2007 WL 3033865, at *1 n.1 (M. D. Pa. Oct. 15, 2007) ("Although Plaintiff has denied certain paragraphs of the Defendants' Statement of Material Undisputed Facts,

he has not pointed to record evidence to support such denials. Therefore, pursuant to Local Rule 56.1, those material facts are deemed to be admitted."). Defendants respond that their failure to make the required filing was due to a misunderstanding of the magistrate judge's motions practice. They contend that, in any event, they could not have denied the facts identified by plaintiff, and that their failure to contest those facts does not undermine the disposition recommended by the magistrate judge.

The record shows that the magistrate judge in effect construed the facts in favor of plaintiff, and recommended, nevertheless, that as a matter of law Melrose was not entitled to summary judgment. For the reasons set out in the R & R, this court agrees.

B. IMMUNITY FOR ZONING BOARD MEMBERS IN THEIR INDIVIDUAL CAPACITY

Even if the court were to find that summary judgment could not be granted in favor of defendants, the individual defendants - Levine, Murrin, and Fife - are entitled to immunity in this case. Generally a judge is immune from suit, including a suit for money damages. *Mireles v. Waco*, 502 U.S. 9, 11-12, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991). In section 1983 actions, judicial immunity is extended to officials who, while not judges perform tasks similar to those of a judge. *Antoine v. Byers & Anderson*, 508 U.S. 429, 432, 113 S. Ct. 2167, 124 L. Ed. 2d 391 (1993). This type of immunity is called "quasi-judicial immunity" and is limited to the judicial type functions undertaken by the official. Id. In determining whether an official is protected under quasi-judicial immunity, the Supreme Court has stated:

> [T]he touchstone for the doctrine's applicability has been performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights . . . . When judicial immunity is extended to officials other than judges, it is because their judgments are functionally comparable to those of judges - that is, because they, too, exercise a discretionary judgment as a part of their function.

Id. at 435-36 (internal citations omitted). In *Dotzel v. Ashbridge*, 438 F.3d 320 (3d Cir. 2006), the Court of Appeals for the Third Circuit adopted a three-part inquiry to determine whether a job function is quasi-judicial in nature: Does the official (1) "perform the traditional adjudicatory function, in that he decides facts, applies law, and otherwise resolves disputes on the merits"; (2) "decide cases sufficiently controversial that in the absence of absolute immunity he would be subject to numerous damages actions"; and (3) "adjudicate disputes against a backdrop of multiple safeguards designed to protect the constitutional rights of the parties?" *Id.* at 325 (citing *Butz v. Economou*, 438 U. S. 478, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978)).

The court of appeals has held that in Pennsylvania, zoning boards serve a dual role, "partly legislative and partly quasi-judicial," and that "zoning boards are acting in a quasi-judicial function when they rule upon an application for a zoning permit for a particular piece of property." *Omnipoint Corp. v. Zoning Hrg. Bd. of Pine Grove Twp.*, 181 F.3d 403, 409 (3d Cir. 1999).

In this case, the Zoning Board members performed a traditional adjudicatory function. They held hearings in

Melrose's cases, and accepted argument and evidence from each side. They used that evidence to make findings of fact and applied the Zoning Code to resolve disputes between plaintiff and the Zoning Administrator. It is evident from this case, as well as the long line of First Amendment decisions involving signage and billboards, that zoning cases involving applications for signage are sufficiently controversial that zoning officials could be subject to numerous disputes absent immunity. See e.g. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981); *Riel v. City of Bradford*, 485 F.3d 736 (3d Cir. 2007); *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994). Finally, many procedures were put in place to protect the parties' constitutional rights. The Zoning Board followed rules of evidence, allowed intervention by interested parties, and implemented specific procedures for parties to follow to appeal the decision of the Zoning Administrator, as well as the Zoning Board. The court concludes that the individual Zoning Board members were acting in a quasi-judicial role and are entitled to immunity. Even if summary judgment could not be granted in favor of defendants generally as a matter of law, summary judgment would have to be granted with respect to all claims made against the individual Zoning Board members - Levine, Murrin, and Fife.

IV. CONCLUSION

After reviewing the pleadings and documents, de novo, and considering the Report and Recommendation, plaintiff's objections and defendants' response, the following order is hereby entered:

AND NOW, this 30th day of September, 2008,

IT IS HEREBY ORDERED that defendants' motion for summary judgment (Doc. No. 75) is GRANTED, and the motion for partial summary judgment filed by plaintiff (Doc. No. 80) is DENIED.

IT IS FURTHER ORDERED that the Report and Recommendation, dated May 23, 2008 (Doc. No. 89), as supplemented by this memorandum opinion, is hereby adopted as the opinion of the court, except for the recommendation relating to the first prong of the Central Hudson test.

By the court,
/s/ Joy Flowers Conti
United States District Judge

Footnotes

1 Melrose contends that it had entered into similar agreements with respect to other buildings, but did not attempt to place signs on those buildings in light of defendants' denial of the five applications discussed here.

2 Although the sign size and shape designations for identification signs changed before the subsequent applications for name changes at issue here, the size and shape of the proposed signs relating to the signage approved in the February 1999 applications were "grandfathered" into the regulations and are not at issue here. (Defs.'App. Ex. F(4) at 60-61.)

3 Although defendants claim that the Zoning Code bans all advertising signs, the definition of "Advertising Signs" under the Zoning Code is limited to "off-site" advertising signs. Plaintiff maintains that some advertising signs are permitted in the applicable zones, but they are more strictly limited and regulated than identification signs. (See Pl.'s Response to Defendants' Statement of Facts ¶ 5.)

4 The name "SSSP," which purportedly stood for South Side Parking Authority, an off-site business with which Melrose's president had a connection, was placed on signage erected on the building at 1025-33 Beaver Avenue. (Defs.' App. Ex. F(4) at 5.)

5 "Baruch Atah Hashem" is a Hebrew phrase meaning "Blessed is God." (Pl.'s Facts ¶ 83.)

6 Much of the Zoning Board's opinion, and a large percentage of the oral questioning, dealt with whether there was any relationship between the name of the building and any tenant or business located in the building. This inquiry is irrelevant to the applications in question, because Melrose was not applying for signage under the "business sign" or on premises business identification provisions of the Zoning Code. Melrose was applying for signage under the building identification provision of the Zoning Code.

Civil Action No. 02-1161
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MELROSE, INC., Plaintiff,

vs.

CITY OF PITTSBURGH, CITY OF PITTSBURGH ZONING BOARD OF ADJUSTMENT, CLIFFORD B. LEVINE, ESQ., REGIS D. MURRIN, ESQ., and JESSE W. FIFE, JR., Defendants.

May 22, 2008, Decided

Amy Reynolds Hay

REPORT AND RECOMMENDATION

I. RECOMMENDATION

Melrose, Inc. ("Melrose" or "the Plaintiff"), a Pennsylvania corporation engaged in the business of acquiring and leasing naming rights to buildings in the City of Pittsburgh, filed suit alleging that the Defendants violated its First and Fourteenth Amendment rights by arbitrarily denying Melrose permits to display signs on buildings for which it held the naming rights. The denials were based on the conclusion of the Pittsburgh Zoning Board of Adjustment ("the Board") that the signs were not bona fide identification signs within the meaning of the Pittsburgh Zoning Code ("the Code"), but were instead intended "to avoid the valid restrictions that [the Code] places upon Advertising Signs." (Doc. 82-7 at 21).

The Defendants' Motion for Summary Judgment (Doc. 75) and the Plaintiff's Motion for Partial Summary Judgment on the Issue of Liability (Doc. 80) are pending. It is respectfully recommended that the Defendants' Motion be granted, and that the Plaintiff's Motion be denied.

II. REPORT

A. BACKGROUND

During the period from May 1998 to February 1999, Melrose executed lease agreements with the owners of five Pittsburgh buildings. [1] Each lease granted Melrose the right to name the building and to construct and display signage on the building reflecting that name. [2] The leases, which extended over varying periods of years, did not limit the number of times or how often Melrose was entitled to change the building name.

In February 1999, Melrose filed applications for signage approval with the Zoning Administrator of the City of Pittsburgh ("the Administrator"). (Doc. 82-7 at 7). At that time, the sign size and shape specifications for building identification signs were more generous than those applicable to advertising signs. (Doc..76-11 at 1).

The application process went smoothly. The Administrator approved the name "RamSteiger" for the premises at 840 East Ohio Street. Staiger was the owner of the property, and "Ram" was his business's name. (Doc.76-12 at 5). The premises at 818 East Ohio Street were named "Caskey Limited" after a girlfriend of a Melrose officer. (Doc. 76-10 at 10). Melrose's application to name the West Carson Street premises

the "Three Rivers Building" was approved, as was the request to name the premises at 57 Bates Street "The Cole Building." The Cole Building was named for the son of a Melrose officer. (Doc. 76-12 at 14). Melrose constructed and installed signs reflecting the assigned names. [3]

Almost immediately after Melrose's initial name and sign applications were approved, an amended Code became effective.(See Doc. 82-2). [4] Section 919.01.C of the amended Code distinguished among different types of signs, in relevant part, as follows:

> 2. Advertising Sign means a sign that directs attention to a business, commodity, service or entertainment, conducted, sold or offered:
>
> (a) Only elsewhere than upon the premises where the sign is displayed; or
>
> (b) As a minor and incidental activity upon the premises where the sign is displayed.
>
> 3. Business Sign means a sign that directs attention to a business, profession, or industry located upon the premises where the sign is displayed; to the type of products sold, manufactured, or assembled; and/or to the service or entertainment offered on such premises; except a sign pertaining to the preceding if such activity is only minor and incidental to the principal use of the premises.
>
> 4. Identification Sign means a sign used to identify the name of the individual or

> organization occupying the premises; the profession of the occupant, the name of the building on which the sign is displayed; or the name of the major enterprise or principal product or service on the premises.

Under the amended Code, as under the prior version, advertising signs, regulated pursuant to Section 919.02 of the Code, were subject to more rigorous requirements with respect to location, placement, size, and shape than were non-advertising signs, which were regulated pursuant to Code section 919.03.

Approximately one month after the last of the five buildings leased by Melrose was named and signage was erected, Melrose initiated proceedings to rename the buildings and amend the signage accordingly. (Doc. 82-6 at 3-17). Melrose submitted applications to the Administrator requesting that it be allowed to change the signage. Melrose proposed that the Cole Building be renamed "www.wehirenurses.com," that the SSPP and Caskey Limited buildings be renamed "www.palegalhelp.com"and that the name of the RamSteiger Building be changed to "Baruch Atah Hashem," a Hebrew expression meaning "Blessed be God." He also submitted a signage application for the Three Rivers Building, but neglected to specify the new name. [5]

Before the end of March 2001, the Administrator notified Melrose that each of its name change requests had been denied because the proposed signs constituted advertising rather than business/building identification. On April 18, 2001, Melrose appealed the Administrator's decisions to the Board. The five cases

were consolidated, and hearings were held on May 24 and June 21, 2001. The parties stipulated that the testimony and evidence produced in each individual case would be applicable to all. (Doc. 76-8 at 5).

On December 7, 2001, the Board issued five decisions denying Melrose's appeals. (Doc. 82-7 at 2-25). Rejecting Melrose's proposal that it be permitted to rename two of the buildings "www.palegalhelp.com," and another, "www.wehirenurses.com," the Board found that the proposed signs were not bona fide identification signs but were, instead, "in the nature of a creative plan or strategy of evasion to avoid the valid restrictions which Chapter 919 place[s] upon Advertising Signs." (Doc. 82-7 at 8, 21; Doc. 76-7 at 3).

The Board also rejected Melrose's right to change the name of and signage on one of the buildings to "Baruch Atah Ashem," concluding that what Melrose characterized as a "religious message" did not fall within the building identification definition, or any alternate provision of the Code. (Doc. 76-4 at 4). The Board invited further briefing on the constitutional implications raised by this application. Melrose did not pursue this case at the Board level. The Board's fifth decision addressed Melrose's application to change the name on one of the building signs without designating the new name. Stating that "the Zoning Administrator should not have made a decision or determination as to the subject application until it was completed . . ," the Board remanded this case to the Administrator so that Melrose could submit an amended application. (Doc. 76-6 at 3). Melrose did not re-apply.

On July 1, 2002, Melrose filed this action.

B. STANDARD OF REVIEW

Summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). The mere existence of some evidence favoring the non-moving party will not defeat the motion. There must be enough evidence with respect to a particular issue to enable a reasonable jury to find in favor of the non-moving party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A motion for summary judgment will be granted where the materials in the record, if reduced to admissible evidence, would be insufficient to satisfy the non-moving party's burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

C. MELROSE'S CONSTITUTIONAL CONTENTIONS

The essence of Melrose's dispute with the Defendants is straightforward. First, the Plaintiff contends that the terms of the Code do not restrict Melrose's right to name a building. [6] Second, to the extent that the Defendants argue that Melrose's right to display building identification signs is circumscribed by portions of the Code relating to advertising, that argument is precluded because the Defendants have repeatedly and preferentially permitted other corporate applicants to erect building identification signs that also advertise. [7] Accordingly, the Defendants'

denial of its most recent renaming applications violated its First and Fourteenth Amendments rights.

The court turns to these constitutional claims.

1. THE FIRST AMENDMENT CLAIMS

Melrose contends that in refusing to approve the signage applications, the Defendants infringed protected commercial speech. [8] Specifically, Melrose alleges that: (1) the Defendants' decisions were made with reference to an ordinance containing inadequate standards; and (2) to the extent that the ordinance did contain standards, those standards were arbitrarily applied. (Doc. 81 at 1).

a. The Central Hudson Test

The legal framework for assessing content-neutral restrictions on pure commercial speech was articulated by the Supreme Court in *Central Hudson Gas & Elec. Corp. v. Public Service Commission of NewYork*, 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). [9] According to *Central Hudson*, courts evaluating restrictions on commercial speech must determine whether: (1) the speech at issue concerns lawful activity and is not misleading; (2) the asserted governmental interest is substantial; (3) if the first two criteria are met, the regulation directly advances the governmental interest asserted; and (4) the regulation is more extensive than necessary to serve that interest. This test applies "to restrictions on commercial speech even in cases of alleged viewpoint discrimination." *Eller Media Co. v. City of Oakland*, No. C 98-02237, 2000 U.S. Dist. LEXIS 22006, 2000 WL 33376585 *4 (N.D.

Cal. Dec. 7, 2000) (citing *Greater New Orleans Broadcasting Ass'n v. U.S.*, 527 U.S. 173, 184, 119 S. Ct. 1923, 144 L. Ed. 2d 161 (1999)). The parties do not discuss Central Hudson. [10] The record is, however, sufficient to allow the court to discuss and reach a conclusion regarding each of the relevant factors.

I. Was the proposed signage unlawful or confusing?

First, the court must examine whether the sign content proposed by Melrose is unlawful or misleading. If it is either, the message is not protected by the First Amendment. See *West Virginia Ass'n of Club Owners & Fraternal Serv., Inc. v. Musgrave*, 512 F. Supp.2d 424, 440 (S.D. W.Va. 2007). Although the signage proposed by the Plaintiff is not illegal, it is, in the court's view, misleading.

Melrose insists that the proposed signs constituted building identification. At the same time, however, it admits that all but one of these signs were intended to direct readers to business enterprises having no connection with the buildings on which they were to appear, and could be changed at will. The reality is that the signs with content limited to web addresses could not have been and, in fact, were never intended to be interpreted by the public as anything other than advertising. Melrose does not suggest how the public could possibly have understood that the proposed signs were intended to identify a building. [11] This is especially problematic where Melrose sought to place *identical* signage on two buildings, and intended to give the same name, "www.palegalhelp.com," to a third. Putting the same web address on three buildings would not have promoted building identification, and would have

negated any association between the name and a particular location. [12]

Given the confusion inherent in giving three buildings the same name, the Motions before the court in those cases might well be decided with reference to the first *Central Hudson* factor, on the ground that the misleading nature of the proposed speech removes it from the confines of First Amendment protection. The record, however, establishes that Melrose's signs were ultimately vetoed, not because they were misleading, but because they contained advertising. In the interest of evaluating fully the arguments raised by the parties - especially those involving unequal treatment - the court will examine the remaining *Central Hudson* factors.

ii. Was the City's Interest in Denying the Melrose Applications Substantial?

The second *Central Hudson* prong requires that the court determine whether the City's interest in prohibiting Melrose's signage is substantial. There is no doubt that the regulatory interests set out in Section 919.01 of the Code are "substantial" for purposes of the First Amendment. See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507- 08, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981) (finding it too late to contend that twin goals of the ordinance - traffic safety and the appearance of the city - were not substantial) (footnote and citations omitted); see also *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806-07, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984) (concluding that visual assault on citizens . . . presented by an accumulation of signs posted on public property were "a significant evil within the City's power to prohibit.").

iii. Did Denial of Melrose's Signage Applications Directly Advance the Interests Asserted?

Although it does not say as much, Melrose centers its challenge to the City's disposition of its applications on the third step of the *Central Hudson* analysis. Melrose does not contend that the City lacks authority to regulate signage, nor does it contend that limitations on the size and location of signs fail to advance important governmental interests. Instead, Melrose argues that the City cannot reasonably contend that its interests were directly advanced by prohibiting the signage proposed by Melrose, because, at the same time that it denied the Melrose applications, it permitted larger more powerful corporations to display functionally identical signage.

The law is clear that "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that the restriction imposed will alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1999). The government may make this showing by "reference to studies or anecdotes, or, in some instances, history, consensus, and common sense." *W. Va. Ass'n of Club Owners*, 512 F. Supp.2d at 443 (citing *Lorillard Tobacco Co.*, 533 U.S. at 555.). Plaintiff does not dispute that sign proliferation within the City poses genuine harm. [13] The question, then, becomes whether the restriction on speech imposed on Melrose was intended to mitigate that harm or was intended instead to silence Melrose in particular.

The Defendants argue that the criteria articulated in

the Melrose decisions were directed at mitigating the problem of sign pollution, and that the underlying decision to deny the Melrose application was distinguishable from decisions in the other cases cited by Melrose. In the three decisions addressing Melrose's request to display signs consisting of a web address, the Board found the distinction between advertising and nonadvertising signs to be "paramount." (Doc. 76-5 at 5). It wrote:

> Pursuant to Chapter 919, City Council delineated regulations governing the location, placement, size and shape of advertising signs and other signs, classified as Nonadvertising signs. Pursuant to Chapter 919, and particularly §919.02, City Council placed greater restrictions on the location, placement, size and shape of Advertising signs as opposed to § 919.03 (Nonadvertising signs). Code §919.02 permits Advertising signs only in the AS-O zoning district, subject to compliance with applicable regulations. Pursuant to § 919.03, Nonadvertising signs . . . are not subject to the same stringent requirements pertaining to their location, placement, size and shape . . . .

Id. at 5-6. The Board noted that the signs proposed by Melrose and the signs approved in the cases of Heinz Field and PNC Park, for example, have an "advertising aspect." *Id.* at 6. All have "a commercial context but . . . no apparent relationship to a product manufactured, service rendered or other activities or work carried out at a particular location." *Id.* Despite the fact that all of these signs fell within the Code's definition of advertising, the Board found that the signs for Heinz

Field and other public facilities "inten[ded] to substantially identify the building and location with a given name for the information of the public." Id. In contrast, Melrose's proposed signage was intended "primarily to utilize the location as an advertising vehicle." Id. Categorizing a particular sign as an advertising sign or a building identification sign was, according to the Board, a matter "of degree based on the weight and interpretation of the evidence presented." Id. In differentiating between the two, the Board declined to make a bright line distinction.

Instead, the Board identified criteria [14] that had to be present before a sign with an advertising element could be considered a building identification sign: 1) the sign must "establish a specific destination point that will be generally recognized by the public as being at a set geographical location"; 2) there must be "evidence of intended longevity of the sign adequate to sustain the designated point concept"; 3) "the owner of the facility or a principal long term space user . . . should be in control of the destiny of the sign." Id. The Board stated that failure to adhere to these criteria:

> would thwart the intention of Council reflected in Code §§919.01A.11 and 12 which "recognize that advertising signs are a legitimate advertising medium to be placed in the locations which neither lessen the visual attributes of the City through the placement of such signs, nor cause confusion, safety problems or lessen the ability to identify local businesses through visual clutter; [and to] regulate advertising signs or billboards within the City in the interests of economic prosperity, civic pride, quality of life

> and general welfare of the people who reside in, are visiting, are employed in or conduct business in the City."

Id.

While conceding that the Code does not restrict a property owner's right to select a building name, the Board held that when a building identification *sign* conflicts with the City's proper regulation of signs, "the Board is obligated to consider the intention of City Council in formulating Chapter 919 of the Code in its entirety." [15] Id. at 7. The Board found such a conflict in the Melrose cases because: (1) the sign content was limited to web addresses for profit-making ventures; (2) the proposed name for the building had "no relationship to the owner or to any tenant [or enterprise located] within the building;" (3) the sign was intended to direct readers to a for-profit website business; (4) neither the owner nor any principal tenant of the building exercised control over the sign or its content; and (5) there was no indication that the name assigned to the building would remain in place for any length of time. Id. "[T]he basic purpose of [an] 'identification sign for a building' that is - ongoing public knowledge thereof by observation of a sign, [is] highly inconsistent with the transfer of the building identification rights and the signs reflecting same to a third party who may change such identification for commercial purposes when and so often as it desire[s]." Id. at 8.

The Board resolved the tension between the advertising and building identification components of the Melrose signs as follows:

> [T]he proposed sign . . . is not a bona fide Identification Sign . . . but [is] rather in the nature of a creative plan or strategy of evasion to avoid the valid restrictions which [the Code] placed on Advertising Signs. To find otherwise would be to open the door to a proliferation . . . of Advertising Signs disguised as Building Identification Signs, all beyond the limitations and regulation imposed by . . . the Code on Advertising Signs. Such [an] outcome would be completely foreign to the structure and intent of the Code . . . .

Id. at 7. The Board concluded that any other outcome would have contravened the facts. [16]

The Court finds that the Defendants, in distinguishing between Melrose's proposed signs and other signs that also fell within the Code definition of advertising signs, did not act arbitrarily or out of animus for Melrose or its message. They sought instead to ensure that advertising in the City remains subject to the location and sign strictures set out in other sections of the Code, and that signs denominated building identifications signs promote a link between the name and a place or building that will last long enough that the public can make and benefit from that association. [17] Association between place and name is the essence of building identification. [18] Simply saying that a sign is a building identification sign does not make it so. This is true despite the Plaintiff's argument that the building identification definition, standing alone, was vague. Vagueness in the definition of building identification was irrelevant to Melrose's as applied challenge because a different provision of the Code - the

definition of an advertising sign - was crystal clear, and was applicable to Melrose's applications proposing that web addresses be approved as building names. Moreover, procedural safeguards were in place to review the decisions of the Administrator, and were effective in remedying errors in the Administrator's decision regarding the Hebrew blessing and the case in which no building name was specified.

The record establishes in the general period of time in which this case arose, the Board was aware of the issues posed by naming rights, and recognized that those rights could impact the City's ability to regulate advertising. The exercise of corporate naming rights at sports and other facilities throughout the country and the sums paid to obtain those rights attest to the commercial value inherent in linking a corporate name to a location visited or seen regularly by large numbers of potential consumers. The Board was thus convinced that it was necessary to articulate criteria for differentiating between advertising and identification. "Otherwise," as Board member Levine testified, "you could have advertising everywhere." (Doc. 82-3 at 26). According to Levine, "[the] Board ultimately ended up . . . with some . . . judicial analysis where [it] laid out certain criteria to help define how [it] would interpret identification and how [it] would interpret advertising and how [it] would deal with naming rights." (Doc. 82-4 at 5). Not every set of facts could be covered in the Code. The Board recognized that "[e]very situation is different. The law is such that every factual situation will come up slightly different. . . . [T]he more rules you try to put . . . there would be another exception, another case that would have to balance between two competing sections." Id. at 21.

The record supports the court's finding that the Board's decisions upholding the denial of Melrose's signage applications directly advanced the City's substantial interests. The criteria used to evaluate the Melrose cases were rational and relevant to the harms addressed. Limiting building identification in accordance with these criteria can reasonably be expected to reduce the number of large multiple signs placed on City buildings, and to restrict what are, in reality, advertising signs to locations and sizes contemplated by the Code. The court is, therefore, satisfied that the restriction on Melrose's speech satisfies the third prong of the Central Hudson test.

iv. Was the Restriction Overly Broad?

The Supreme Court does not require that the government's regulation of commercial speech be the least restrictive possible. Rather, it requires that the restriction be reasonable and in proportion to the government's interest. *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989).

In light of the court's findings with respect to the first three parts of the *Central Hudson* test, it need not revisit whether the restriction on Melrose's speech was reasonable. The court thus focuses on whether, in light of the signage-related interests asserted by the City, some narrower restriction was required. The Plaintiff does not suggest and the court cannot imagine what lesser burden on commercial speech might have been imposed. Essentially the Board held that all advertising signs - except those few that have an advertising component but meet the building identification criteria

outlined in the Board's opinions - must conform to the Code provisions governing advertising. The Plaintiff states that the five buildings on which it planned to display signs are located in zones where advertising is permitted. (Doc. 87 at 7 n.11). Assuming that this is accurate, the only thing that the denial of its signage applications requires Melrose to do is place its messages on smaller - and perhaps fewer - signs on the identical buildings. It is free, moreover, to place its messages anywhere in the City that advertising is allowed. Melrose may also display building identification signs, so long as the signs are consistent with the criteria articulated in the Board's decisions.

The fourth factor of the *Central Hudson* test has been satisfied, meaning that, overall, the limits places on the Plaintiff's right to display signs containing commercial speech pass muster under the First Amendment.

2. THE EQUAL PROTECTION CLAIMS [19]

Melrose argues that the Defendants, in allowing other corporations to use advertising in exercising their naming rights, violated its right to equal protection under the Fourteenth Amendment to the United States Constitution. [20] According to Melrose, we must apply strict scrutiny in evaluating this claim because the Defendants have transgressed its "fundamental right" to commercial speech. The Supreme Court has clarified on several occasions that strict scrutiny does not apply in the context of commercial speech. See, e.g., *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 117 S. Ct. 2130, 138 L. Ed. 2d 585 (1997). "Furthermore, if the regulations in question have passed constitutional muster under the commercial

speech test of Central Hudson, they likewise pass the appropriate equal protection analysis." *American Federated General Agency, Inc. v. City of Ridgeland*, 72 F. Supp.2d 695 (S.D. Miss. 1999) (citing *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 343 n.9, 106 S. Ct. 2968, 92 L. Ed. 2d 266 (1986)) (holding it apparent from the court's discussion of the First Amendment, "particularly the third and fourth prongs of the Central Hudson test that the appellant can fare no better under the equal protection guarantee of the Constitution.").

III . CONCLUSION

For the reasons set out above, it is recommended that the Plaintiff's Motion for Partial Summary Judgment on the Issue of Liability (Doc. 80) should be denied, and the Defendants' Motion for Summary Judgment (Doc. 75) should be granted.

In accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1)(B) & (C), and Local Rule 72.1.4 B, the parties are permitted to file written objections and responses thereto in accordance with the schedule established in the docket entry reflecting the filing of this Report and Recommendation. Failure to timely file objections may constitute a waiver of any appellate rights.

Respectfully submitted,

/s/ Amy Reynolds Hay
United States Magistrate Judge
Dated: 22 May, 2008

Footnotes

1 Melrose contends that it had entered into similar agreements with respect to other buildings, 1 s, but did not attempt to place signs on those buildings in light of the Defendants' denial of the five applications discussed here.

2 The first lease granted Melrose naming rights to the premises located at 840 East Ohio Street from May 27, 1998 until June 30, 2013. (Doc. 82-5 at 30). On July 8, 1998, Melrose entered into a seventy-two month lease which granted Melrose the "authorization for property naming rights" for the building located at 568 Lincoln Avenue. Id. at 42-43. A third lease covering a fifteen year term was executed on February 9, 1999, for the building located at 818 East Ohio Street. Id. at 32. A fourth eighteen year lease gave Melrose the naming rights to premises located on West Carson Street (Doc. 76-19 at 2). Last, Melrose executed a twenty-seven year lease which granted it "exclusive rights and appurtenances for the naming and/ or renaming of the property [located at 57 Bates Street, Pittsburgh]." (Doc. 82-5 at 440).

3 The name "SSSP," which purportedly stood for South Side Parking Authority, an off-3 site business with which Melrose's President had a connection, was placed on signage erected on the building at 1025-33 Beaver Avenue. (Doc. 76-12 at 5). The record reflects that Melrose did not file a permit application for this sign.

4 Section 919.01 of the Code lists the purposes underlying the City Council's 4 il's regulation of signage. The regulations were intended to:

1. Encourage sound practices with respect to size, spacing, illumination, type and placement of signs for the purpose of safeguarding, and enhancing properties in each of the various types of zoning districts;

2. Provide an environment that will promote the orderly growth and development of business in the City;

3. Protect public investment in public structures, open spaces and thoroughfares;

4. Promote the safety and welfare of the people at large;

5. Recognize the City's environmental attributes, system of parks, Greenway Program, Riverfront Plan, and public open spaces and the effect that signage can have on these features and programs;

6. Recognize the City's built environment, its significant architecture and cultural resources which provide the City with a sense of its history;

7. Recognize that the unique views and vistas offered by Pittsburgh's many hills, valleys, and rivers provide the City with a visual amenity which helps to attract residents, businesses, and visitors to the City;

8. Preserve and perpetuate uncluttered and natural views for the enjoyment and

environmental enrichment of the citizens of the community and visitors hereto;

9. Enhance the Community appearance, reduce visual clutter and blight, and promote the recreational value of public travel and the economic development of the community;

10. Promote safety upon the streets and highways in the City;

11. Recognize that advertising signs are a legitimate advertising medium in the locations which neither lessen the visual attributes of the City through the placement of such signs, nor cause confusion, safety problems or lessen the ability to identify local businesses through visual clutter; and

12. Regulate advertising signs, or billboards, within the City in the interests of economic prosperity, civic pride, quality of life and general welfare of the people who reside in, are visiting, are employed in or conduct the business of the City.

5 At the hearing before the Board, the President of Melrose, Alan Gochnour ("Gochnour"), testified that he intended, ultimately, to change the name of this building, too, to www.palegalhelp.com. (Doc. 76-12 at 89).

6 This argument is illustrated in the following exchange at the Board hearing:

> Board Member Levine: Do you plan to change the name of the building from time to time?
>
> Counsel for Melrose: We might from time to time.
>
> Board Member Levine: And really, under your theory, there is no limit. Because any name that you might want to name it, you have the right to name it because you own that part of the building or at least –
>
> Counsel for Melrose: Just as I can call my building Nernberg Building, 301 Smith Street Building, the Legal Services Building, or any other name that I want to put on it. Unless Heinz objects to me calling it the Heinz Building, I would have the right to name that building in any way I want.
>
> If I want to name it after my great-grandmother or name it after - my wife's first name or anything else that I want to do, in short, yes, we have an absolute right to name the building any way we want, and especially under the ordinance, and that is the crux of the issue.

(Doc. 76-9 at 14).

7 Melrose admits that its proposed signage fell within the Code's definition of an advertising sign. At the hearing before the Board, Gochnour was asked about his plan to name two of the five buildings "www.palegalhelp.com." He stated that "www.palegalhelp.com" was the name of a business

enterprise that he had started by applying for the domain name, buying software, and talking to "a couple of lawyers." (Doc. 76-11 at 11-12). He confirmed that the proposed name bore no relationship to business conducted in the buildings where the signs were to be placed. Id. at 13. These signs were intended "to direct attention to the name of 'paralegalhelp.com.'" Id. at 12.

8 For purposes of summary judgment, Melrose agrees that its desired building name signs constitute commercial speech. (Doc. 81 at 3). "Commercial speech, with its lesser protection, is at bottom advertising." *Pruett v. Harris County Bail Bond*, 499 F.3d 403, 408 (5th Cir. 2007). Melrose also agrees that the definitions set forth in the Code are content-neutral (Doc. 81 at 9), and that its challenge to the ordinance is an "as applied" rather than a facial challenge. Id. at 4. An "as applied" challenge is "based on the idea that the law itself is neutral and constitutional in all fact situations, but that it has been enforced selectively in a viewpoint discriminatory way." *McGuire v. Reilly*, 386 F.3d 45, 62 (1st Cir. 2004).

9 The Central Hudson framework is "substantially similar" to the test for time, place, and manner restrictions. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001). The "time , place, and manner test," however, applies only where an ordinance restricts commercial and non-commercial speech. *XXL of Ohio, Inc., v. City of Broadview Heights*, 341 F. Supp. 2d 765, 783 (N.D. Ohio 2004) (citing *Cleveland Area Bd. of Realtors v. City of Euclid*, 88 F.3d 382, 385-86 (6th Cir. 1996)).

10 It would not be unfair to say that the parties'

approach to this case was to throw every First Amendment test (except Central Hudson) and standard of review into a sieve, and wait for the court to sift out what was irrelevant.

11 The Hebrew phrase proposed in one of the Melrose applications cannot be understood to constitute advertising and, as the Board recognized, Melrose's request to put the phrase on a sign should not have been denied on that basis. It is no more reasonable , however, to argue that the language was intended to identify a building.

12 "Melrose argues that "[i]t is no more misleading to name a warehouse building www.wehirenurses.com than to name a sports venue 'Mellon Arena' or a concert facility 'Chevrolet Amphitheater.'" (Doc. 81 at 4 n.4). Melrose does not, however, describe the nature of the confusion likely to be generated by the latter names, and does not point to evidence that actual confusion has occurred.

13 While the Melrose cases were pending, the City Planning Commission submitted a Report and Proposal to the City Council dealing with limits on the size and location of various types of signs throughout the City. The report noted that the "civic and architectural integrity of the Pittsburgh skyline is threatened by a growing demand to place business and identification signs with corporate names, slogans and logos on downtown buildings, taking advantage of the growing regional and national exposure of the skyline. . . Pittsburgh's neighborhood vistas are also threatened . . . by the proliferation of large business and identification signs that overwhelm their host building and degrade

the civic nature of the building's district and neighborhood." (Doc. 82-7 at 31).

14 These criteria were first articulated by the Board in an August 15, 2001 Interim Decision in Zoning Case 85 of 2001, the matter involving construction of signage at Heinz Field. (Doc. 82-8 at 10). This Interim Decision contained an additional criterion that was not included in the five Melrose decisions. In the Interim Decision, the Board wrote that in order to be considered an identification sign rather than an advertising sign, the location on which it is placed "must be important to or of interest to a material segment of the public whether the designated facility is one of culture, art, architecture, sports, office, business or other commercial or nonprofit uses. Id. at 11.

15 Melrose argues that because the Code's definition of "building identification signs" is broad enough to cover the proposed names, it is not necessary to look beyond this definition to resolve this matter. Here, where the Plaintiff has explicitly recognized the advertising effect of its signage, focusing on only one section of the Code would violate a cardinal rule of statutory construction: "Every [ordinance] must be construed, if possible, to give effect to all of its provisions." 1 Pa. Const. Stat. Sect. 1921(a). A number of other presumptions also inform the court's analysis. Under Pennsylvania law:

> [I]t is presumed that the legislators, or council members do not intend to violate the Constitution of the United States or of this Commonwealth. Secondly, it is presumed that the legislators intend to favor the public interest as against any private interest. Third, there is a

> strong presumption in favor of the constitutionality of legislative acts, including municipal legislation. Fourth, the title of the law may also be considered in the construction and any other title, part, article, chapter, section or other division may be used to aid in construction. Lastly . . . the Ordinance at issue is to be liberally construed as to effectuate its objects and promote justice.

Brown v. City of Pittsburgh, 543 F. Supp. 2d 448, 2008 WL 558716 * 16 (W.D. Pa. 2008) (citations to Pennsylvania case law omitted).

16 In the deposition of Clifford B. Levine, a Board member participating in the Melrose appeals, the following exchange took place:

> Q: What did the applicant say the purpose of the sign was for? What did it say on the application? Does it say advertising?
>
> A: It doesn't matter what the applicant says it is.
>
> Q: Let's look [at the next Exhibit]. What was the purpose for the sign in that application?
>
> A: Excuse me. Is this a different case that you just handed me? The lettering is PALegalhelp.com. So you have [this name] on two separate buildings. Again, this goes to my point that we're not stupid, we know that these are not for purposes of pure identification. It's really for the purposes of communicating that Web site to the world.

> Q: Are you saying that the Law and Finance - there can't be two buildings downtown named Law and Finance Building?
>
> A: In the context of what was being done here with the control of the applicant to change the frontage and change that sign . . . and knowing that there were five of these, we came to the conclusion and set out in the opinion that this was not going to be a business, that this was no different than having an advertising sign.

(Doc. 82-4 at 29 -30). Levine also stated:

> A: We did not believe that was - first of all, let me just say there were three members on the zoning board. We're not stupid and we can see in our view this was a sham. What was being proposed here was a sham.
>
> If you could see the buildings, you could see the signage . . . .
>
> Q: I'm only asking you about –
>
> A: It's in the context . . . We see five cases that came in for extremely large signs on basically old warehouse buildings that were prominently located near highway systems. That seemed to be the scheme to some extent with these signs. . .

Id. at 27.

17 Melrose argues that it could have established this link simply by adding the word "building" to the content

of its signs. The argument is disingenuous. Naming three structures the "www.palegalhelp.com Building" does nothing to help the public navigate the City streets or find a business that they are interested in patronizing. From an identification standpoint, even the revised name would generate confusion.

18 Although they address First Amendment issues raised by exceptions to a general signage ban, the Third Circuit Court of Appeals decisions in *Rappa v. New Castle County*, 18 F.3d 1043 (3d. Cir. 1994), and *Riel v. City of Bradford*, 485 F.3d 736 (3d Cir. 2007), underscore the important relationship between signage and location. In Rappa, the Court held:"When there is a significant relationship between the content of particular speech and a specific location, the state can exempt speech having that content from a general ban so long as the exemption is substantially related to serving an interest that is at least as important as that served by the ban." *Id.* at 1066 (footnote omitted). The Court explained that the state could establish the requisite relationship between speech and location by showing that "a sign better conveys its information in its particular location than it could anywhere else." *Id.* at 1065. The context specific rule in Rappa was applied in Riel to permit a speech ban exemptions for on-site advertising. "Like an address sign, a sign denoting the name and profession of a building's owner or occupant better conveys its information in the location than it could anywhere else." 485 F.3d at 750. The Court in Riel also upheld building identification signs, writing, "[T]his is precisely the type of context-specific exception that was allowed in Rappa." *Id.* at 751.

19 The analysis of Melrose's equal protection claims

made pursuant to Article One, Section Twenty-Six of the Pennsylvania Constitution is the same as the analysis governing claims made pursuant to the Fourteenth Amendment of the United States Constitution. The court's disposition of the federal equal protection claims applies with equal force to claims made under the Pennsylvania Constitution. *Kramer v. Workers' Comp. Appeal Board*, 584 Pa. 309, 883 A.2d 518, 532 (Pa. 2005).

20 Melrose also raises a Fourteenth Amendment procedural due process claim which does not merit extended discussion. He argues that the fact that Defendant Levine was on the planning board helping to draft code provisions should preclude him from adjudicating disputes arising under the Code. At the time of the Melrose hearing, Defendant had served jointly on the planning commission and on the Board from 1994 through 2006. (Doc. 82-3 at 3) . Melrose does not explain how Levine's role in drafting the Code prevented him from applying its terms fairly. Judges are often instrumental in drafting local and Federal Rules, but are not precluded from applying those rules in cases that come before them. Melrose did not ask that Levine recuse himself, and does not point to anything in the record to raise even a wisp of a suggestion that Levine acted improperly or unfairly in evaluating its applications. It would indeed be difficult to argue that there would have been a different outcome in the Melrose appeals had Levine not participated, given that the other two Board members were in accord with Levine. Melrose's contention that Levine gave improper help to others whose appeals were denied - particularly those in the Heinz case - is belied by the record. Heinz contacted Levine after its

appeal was denied to ask what options were open to it in having signage erected for the Great Hall at Heinz Field. Levine replied that Heinz could appeal the Board's denial, or could seek to have the Code amended. Id. at 35. He then made several proposals for amendment. The record does not show that these avenues of address were not open to Melrose. More fundamentally, the record does not show that Melrose ever contacted Levine or any other Board members following the denial of its appeals, or that it sought advice regarding how its goals might be accomplished. In these circumstances, it is difficult to credit Melrose's contention that it received inferior treatment.

Filed 8/13/2010
No. 08-4425
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MELROSE, INC.,
Appellant
v.
CITY OF PITTSBURGH; CITY OF PITTSBURGH ZONING BOARD OF ADJUSTMENT; CLIFFORD B. LEVINE, ESQ.; REGIS D. MURRIN, ESQ.; JESSE W. FIFE, JR.,

SUR PETITION FOR REHEARING EN BANC

Present: McKEE, Chief Judge, SLOVITER, SCIRICA, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, VANASKIE, Circuit Judges and DIAMOND,* District Judge.

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,
/s/ Julio M. Fuentes
Circuit Judge

Footnote

*Honorable Paul S. Diamond, United States District Judge for the Eastern District of Pennsylvania, sitting by designation. Judge Diamond's vote is limited to panel rehearing only.